TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 283 41.

BENTON TURNER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED MAY 11, 1895.

(15,900.)

(15,900.)

SUPREME COURT OF THE UNITED STATES.

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BENTON TURNER, PLAINTIFF IN ERROR,

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THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1896.

1 UNITED STATES OF AMERICA, } ss:
State of New York, }

I, Gorham Parks, clerk of the court of appeals of the State of New York, by virtue of and in obedience to the annexed writ of error, do hereby certify that annexed hereto is a true and complete transcript of the record and proceedings had in said court in the cause of The People of the State of New York, respondents, against Benton Turner, appellant, as the same remains of record and on file in my office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Albany, New York, this 9th day of May, 1895.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

2 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York, plaintiff, and Benton Turner, defendant, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity, a manifest error hath happened, to the great damage of said Benton Turner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court to be then

3 and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

The foregoing writ is hereby allowed.

H. B. BROWN,
Associate Justice.

4 [Endorsed:] U. S. Supreme Court. Benton Turner, pl'ff in error, against The People of the State of New York, def't in error. Writ of error. Frank E. Smith, attorney for plaintiff in error; office address, Coal and Iron exchange, 21 Courtlandt street, New York.

5 UNITED STATES OF AMERICA, } ss:
State of New York, }

To Honorable Henry B. Brown, justice of the Supreme Court of the United States:

The petition of Benton Turner respectfully shows:

I. That on June 6th, 1891, the supreme court of the State of New York rendered a final judgment against him in a certain cause, wherein The People of the State of New York were plaintiffs and your petitioner was defendant, for the sum of two thousand one hundred ninety-eight dollars and sixty cents ($2,198.60), as by reference to the record and proceedings in said cause will more fully appear.

II. That your petitioner duly appealed from the said judgment to the court of appeals of the State of New York, and such proceedings were had upon said appeal that on the 9th day of April, 1895, judgment was rendered against your petitioner and in favor of the said The People of the State of New York, affirming in all respects and with costs the said judgment of the supreme court of the State of New York.

III. That said judgment of the court of appeals is final, and said court is the highest court in the State of New York in which
6 a decision in said suit could or can be had.

IV. That, as your petitioner is informed and believes, the record in the said cause is now in the said court of appeals.

V. That your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under section 709 of the Revised Statutes of the United States, because upon the trial of said suit the validity of a statute of the State of New York, to wit, chapter 448 of the Laws of 1885, was drawn in question, upon the ground that it was repugnant to the first section of the fourteenth article of the amendments to the Constitution of the United States, and the decision of the courts of the State of New York thereon were and are in favor of the validity of said statute and against the right claimed by your petitioner under the Constitution of the United States; all of which will more fully appear from the record of the proceedings in said cause, a copy of which is herewith submitted.

Wherefore your petitioner prays for allowance of a writ of error returnable into the Supreme Court of the United States, and for a citation and supersedeas; and your petitioner will ever pray, &c.

BENTON TURNER.

7 STATE OF NEW YORK, } ss.:
County of Clinton, }

Benton Turner, being duly sworn, says: I am the petitioner above named. I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

BENTON TURNER.

Sworn to before me this 17th day of April, 1895.

A. GUIBAUL,
Notary Public.

8 [Endorsed:] United States Supreme Court. Benton Turner, plaintiff in error, against The People of the State of New York, defendant in error. Petition for writ of error. Frank E. Smith, attorney for plaintiff in error; office address, Coal and Iron exchange, 21 Courtlandt street, New York.

9 New York Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
against
BENTON TURNER, Appellant. }

Assignment of Errors.

The defendant, Benton Turner, hereby alleges error in the record and proceedings in the above-entitled cause as follows:

First. That the court erred in finding that the sale of the land in question made to the People of the State of New York October 12th, 1877, and all proceedings prior thereto from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular and were regularly given, published, and served according to the provisions of chapter 427 of the Laws of 1855 and all laws directing or requiring the same or in any manner relating thereto by virtue of the rule of evidence and limitation prescribed by chapter 448 of the Laws of 1885.

10 Second. That the court erred in refusing to receive in evidence the assessment-rolls of the town of Harriettstown for the years 1867, 1868, 1869, and 1870 upon the ground that the same were immaterial and irrelevant by force of chapter 448 of the Laws of the State of New York for 1885 and in overruling the claim made by the defendant that the said statute was repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Third. That the court erred in refusing to allow defendants to show that the warrants attached to Exhibits C and F, being the copy assessment-rolls of the town of Harriettstown for the years 1867 and 1870, were the original warrants and bear the genuine

signatures of the supervisors of the county of Franklin for those years respectively, upon the ground that such facts were immaterial, irrelevant, and incompetent under chapter 448 of the Laws of 1885 and in overruling the claim made by defendant that said chapter 448 was repugnant to the Constitution of the United States.

Fourth. That the court erred in refusing to make the twenty-third, twenty-fourth, and twenty-fifth findings of fact separately, requested by defendant, upon the ground that the deed to the plaintiff upon the tax sale was conclusive evidence, to the contrary of the fact stated in each of said requests respectively.

11 Fifth. That the court erred in refusing to hold that chapter 448 of the Laws of the State of New York for the Year 1885, so far as it attempts or undertakes or purports to render valid and effectual any past sale of land for unpaid taxes, which sale at the time it was made was for any reason illegal and void, is repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Sixth. That the court erred in refusing to hold that chapter 448 of the Laws of New York for the Year 1885, considered as a statute of limitation and with reference to sales of land for unpaid taxes made prior to its passage to the People of the State of New York, which sales were for any reason illegal and void when they were made, is repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Seventh. That the court erred in rendering judgment for the plaintiff.

Wherefore the said Benton Turner prays that the judgment rendered in the above-entitled action against him by the supreme court of the State of New York and affirmed by the court of ap-

12 peals of the State of New York may be reversed.

FRANK E. SMITH,
Attorney for Defendant and Appellant.

13 [Endorsed:] N. Y. court of appeals. The People of the State of New York, respondent, against Benton Turner, appellant. Assignment of errors. Frank E. Smith, attorney for —. Office address, Coal and Iron exchange, 21 Courtlandt street, New York.

14 Know all men by these presents that we, Chauncey Turner and Herbert C. Turner, both of Plattsburgh, New York, are held and firmly bound unto The People of the State of New York in the just and full sum of five thousand dollars, to be paid to the said The People of the State of New York; for *the* which payment, well and truly to be made, we bind ourselves and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of April, 1895.

Whereas The People of the State of New York recovered a judgment against Benton Turner in the supreme court of said State for

the sum of two thousand one hundred and ninety-eight dollars and sixty cents ($2,198.60), which judgment was entered in the office of the clerk of Franklin county, New York, on June 6th, 1891; and

Whereas an appeal from said judgment was taken by said Benton Turner to the court of appeals of the State of New York, which court on April 9th, 1895, rendered final judgment in said cause, affirming with costs the said judgment of the supreme court in favor of The People of the State of New York; and

Whereas the said Benton Turner has prosecuted or is about to prosecute a writ of error to the Supreme Court of the United States to reverse the said judgment of the court of appeals of the State of New York:

Now, therefore, the condition of the obligation is such that if the above-named Benton Turner shall prosecute his said writ of
15 error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise to remain in full force and effect.

CHAUNCEY TURNER. [L. S.]
HERBERT C. TURNER. [L. S.]

UNITED STATES OF AMERICA, } ss:
State of New York, County of Clinton, }

On this 17th day of April, 1895, before me personally came Chauncey Turner & Herbert C. Turner, both to me personally known and known to me to be the persons described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

WALLACE TURNER,
Notary Public.

UNITED STATES OF AMERICA, } ss:
State of New York, Clinton County, }

Chauncey Turner and Herbert C. Turner, being severally duly sworn, each for himself deposes and says that he resides at Schuyler Falls, Clinton county, New York, and is a freeholder within
16 said State; that he is worth the sum of five thousand dollars over and above all debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

CHAUNCEY TURNER.
HERBERT C. TURNER.

Sworn before me this 17 day of April, 1895.

WALLACE TURNER,
Notary Public.

The foregoing bond approved this 19th day of April, 1895, to operate as a supersedeas.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

A copy.
[Seal Court of Appeals, State of New York.]
GORHAM PARKS, *Clerk.*

17 [Endorsed:] Benton Turner, plaintiff in error, against The People of the State of New York, defendant in error. Supersedeas bond. Filed April 20th, 1895.

18 UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein Benton Turner is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

19 [Endorsed:] To the People of the State of New York, defendant in error. Rec'd Ap'l 23d, 1895. Due and personal service admitted. Albert Hessberg, att'y for the pl'ff, def't in error.

20 N. Y. Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against
BENTON TURNER, Appellant.

Case on appeal to court of appeals.

Albert Hessberg, attorney for respondent, Albany, New York.
Frank E. Smith, attorney for appellant, Plattsburgh, New York.

21 Supreme Court.

Trial desired in Franklin county.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
vs.
BENTON TURNER, Defendant. } Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear or answer,

judgment will be taken against you by default, for the relief demanded in the complaint.

Dated March 28, 1887.

D. O'BRIEN,
Attorney General,
By P. S. PALMER,
Attorney for the Forest Commission, Plaintiff's Attorney.

Office address, Plattsburgh, New York; post-office address, Plattsburgh, New York.

22 Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
vs.
BENTON TURNER, Defendant. } Complaint.

The plaintiff complains of the defendant in this action and alleges—

That this action is brought in behalf of the plaintiff by the forest commission of the State of New York.

That the plaintiff is now and at the times hereinafter mentioned was the owner and in possession of the following-described premises, to wit: The southeast quarter of township No. twenty-four (24) in great tract No. one (1) of McComb's purchase in the county of Franklin, New York, and also of lot No. twelve (12) in township twelve (12) in the old military tract in the county of Essex, New York.

That said lands are and were at the times hereinafter mentioned within the forest preserve of the State of New York.

That the defendant, Benton Turner, at divers times, between the 1st day of September, 1886, and the 25th day of March, 1887, unlawfully entered in and upon the land and premises above described so belonging to plaintiff and so possessed and unlawfully cut or cause to be cut spruce timber and spruce trees, on said premises and within said forest preserve, and unlawfully converted the same into saw-logs to the number of fifteen thousand logs by count, and

23 unlawfully took, drew and deposited said logs, so cut or caused to be cut by him in "Cold brook" (so called) upon said premises situate in Franklin county aforesaid, and in and upon the borders and banks of said brook and the lands adjoining thereto, and unlawfully detains said logs from the said plaintiff.

That said logs and each and every one of them then were and are still the property of the plaintiff, and that plaintiff claims the right to immediate possession thereof.

That said logs are of the value of 33⅓ cents each, and of the value of five thousand dollars in the aggregate.

Wherefore plaintiff demands judgment against the said defendant for the possession and the recovering of possession of said property by plaintiff or for the value thereof, to wit: $5,000, in case a

delivery cannot be had and also damages to the amount of one thousand dollars for the unlawful detention thereof, and in case said property is retained by the defendant pending this action for such further damages for such unlawful detention as shall be just.

D. O'BRIEN,
Attorney General,
By PETER S. PALMER,
Attorney for the Forest Commission, Plaintiff's Attorney.

Office and post-office address, Plattsburgh, N. Y.

The summons and complaint were personally served on defendant on April 11, 1887.

24 Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
vs.
BENTON TURNER, Defendant. } Answer.

The defendant for answer to the complaint herein,
First. Denies each and every allegation contained therein.
Second. For a second and further answer thereto, the defendant alleges, that at all the times mentioned in the complaint in this action, he was the owner and in possession of the premises therein described.

BECKWITH, BARNARD & WHEELER,
Attorneys for Defendant.

New York Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
BENTON TURNER.

It is hereby stipulated that this action and all the issues
25 therein be referred to Hon. Richard L. Haud of Elizabethtown, N. Y., counsellor-at-law, as sole referee to hear and determine, and that an order to that effect may be entered by the clerk of Franklin county.
Dated September —, 1887.

DENIS O'BRIEN, *Attorney General,*
By PETER S. PALMER,
Attorney Forest Commission, Plaintiff's Attorney.
BECKWITH, BARNARD & WHEELER,
Attorneys for Defendant.

N. Y. Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF — YORK
vs.
BENTON TURNER. } Order of Reference.

On reading and filing the annexed consent of the respective parties, and on motion of the attorney general of the State of New York, plaintiff's attorney—

It is ordered, that this action and all the issues therein be referred to Hon. Richard L. Hand of Elizabethtown, New York, counsellor-at-law, as sole referee to hear and determine.

N. M. MARSHALL, *Clerk.*

26 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
BENTON TURNER. } Report of Referee.

I, Richard L. Hand, sole referee to hear and determine the above-entitled action, do hereby respectfully report that having first taken the proper official oath, I have heard the proofs and allegations of the respective parties herein, and having deliberated thereupon, I do find the following

Facts.

I. The southeast quarter of township 24, great lot one, Macomb's purchase, situated in the town of Harietstown, Franklin county, New York, being the premises mentioned in the complaint herein, was sold for unpaid taxes in the year 1859, by the comptroller of the State of New York, to Samuel W. Barnard and conveyed to him by the said comptroller in pursuance of such sale by deed dated December 27, 1864.

II. At the time of the sale mentioned in above finding I, Samuel W. Barnard, with one F. J. Barnard, had or claimed to have title to the land or an undivided interest therein, which interest, together with the estate and interest in said land acquired by Samuel W. Bernard, under the comptroller's deed mentioned in finding I, was conveyed by Samuel W. and F. J. Barnard to Christopher F. Norton by deed dated November 25, 1872, recorded in Franklin county, January 22, 1872, in Book 51 of Deeds, page 486.

III. The lands mentioned in finding I were again sold for
27 unpaid taxes in the year 1866 by the comptroller of the State of New York, and in pursuance of such sale, conveyed by the comptroller to Christopher F. Norton by deed, dated January 22, 1873, recorded in Franklin county, February 25, 1873, in Book 57 of Deeds, page 577.

IV. Christopher F. Norton died intestate in or about 1882, leaving a widow and eight children, him surviving, his only heirs-at-law. Six of these children and heirs-at-law conveyed all of their estate, right, title and interest in and to the premises mentioned in find-

ing I to John B. Riley, December 16, 1886, who conveyed all his estate, right, title and interest therein, December 27, 1886, to the defendant.

V. June 20, 1877, John D. Spicer, and another, recovered a judgment against Christopher F. Norton for $59,178.28, the roll whereof was duly filed and said judgment docketed in the office of the clerk of Rensselaer county on that day, and a transcript thereof was duly docketed in the office of the clerk of Franklin county, June 21, 1877. In pursuance of an order duly made by the supreme court, and also a decree of the surrogate's court having jurisdiction in the premises, execution was duly issued on this judgment to the sheriff of Franklin county, April 28, 1887, under which execution, on June 18, 1887, the said sheriff sold all the estate, right, title and interest which Christopher F. Norton had in and to the premises mentioned in finding I, June 21, 1877, or thereafter acquired, for the sum of $6,000 to the defendant, and on the 19th day of February, 1889, said sheriff duly executed and delivered to the defendant a deed of conveyance of the land so sold to him.

VI. October 12, 1877, the premises mentioned in finding I were sold by the comptroller of the State of New York for unpaid taxes, being taxes for each of the years 1866, 1867, 1868, 1869 and 1870; and also for school taxes for 1869 and 1870 (including highway taxes for all of said years), amounting in the aggregate, with interest
28 and expenses of sale, to the sum of $1,266.46. At such sale, these premises were bid in by the comptroller on behalf of the plaintiff and thereafter conveyed by the comptroller to the plaintiff by deed, dated June 9, 1881, which deed was recorded in Franklin county, June 8, 1882. The two years allowed by law for redemption from such sale, expired October 12, 1879.

VI-. The title acquired by the plaintiff to the lands mentioned in finding I, under and by virtue of the comptroller's deed, mentioned in finding VI, is the only title shown or claimed by the plaintiff on the trial of this action.

VIII. No proof has been made in this action that the plaintiff, as purchaser at the tax sale of 1877 or otherwise, served or caused to be served upon any person during the two years allowed by law for redemption from such sale any notice under the provisions of section 68 of chapter 427 of the Laws of 1855.

IX. Neither the plaintiff nor any officer of this State on its behalf ever took actual possession of the lands mentioned in finding I, or was in the actual possession thereof when this action was brought.

X. The premises described in the complaint and in finding I above, are wild and uncultivated and unimproved forest land, uninclosed, with no dwelling-house or other building thereon. In the northeast part thereof at all times since about 1862 there has been a natural meadow or "beaver meadow" extending into the adjoining quarter of the same township and also across the township line into the adjoining county. This is a narrow strip lying along the sides of a stream called Rogers brook, and containing in all about ten acres, having an average width of about eight rods, four or five acres

of the whole lying in the southeast quarter of the township about one acre in the adjoining county, and the remainder in an adjoining quarter of the township. The land is low and wet so as to be inaccessible with horses, except when frozen in the winter, and is covered with water from the melting snows for a variable period of each spring. The surface is more or less occupied with clusters of alders and other bushes and a wild grass, available as food for cattle but not for horses, grows naturally where the bushes do not exclude it. No human habitation or public highway has ever existed within three miles of it, and no private road was ever made to it, except as teams of lumbermen passed through it in the winter. Such grass, the natural product of this piece of land, could be made into hay, and was of some value and an article of merchandise to some extent in that region.

The entire southeast quarter of township 24 contains 7,500 acres of land.

XI. About 1860, one Harvey Moody, residing about six miles from the natural meadow mentioned in finding X, above, entered thereupon and cut the grass growing upon that part of the meadow lying beyond the premises described in finding I, stacked the same upon the surface, and in the following winter drew it away. He did the same for one or two succeeding years, and about 1862 extended his cutting over that part of the meadow lying within the limits of the premises described in finding I. Each year thereafter until his death in April, 1880, he entered on this same land and in lake manner cut the grass and left it in stacks upon the premises until the winter season following, when he, or persons to whom he made sales of a portion of it, drew it away. On two occasions during this period he scattered a little grass seed upon the surface, one peck of "herdsgrass" on one and a like amount of "redtop" on another occasion. The redtop grew to some extent, and the quality of grass afterward cut was slightly improved thereby. The herdsgrass did not grow. On two occasions during this same period of about seventeen years Moody burned over the dry brush and stubble. At some time a slight dam was constructed by throwing poles across at a point where Rogers brook, which runs through the entire length of this beaver meadow, passes between two large stones, and Moody, by the use of a slab or two and these poles, obstructed the flow of the stream at times so as to overflow about half an acre of the land. Nearly or quite every season, when cutting the grass, Moody cut away more or less of the bushes and thus enlarged somewhat the surface occupied by the grass, but such cutting on the one hand and the natural growth of the bushes on the other made the amount of surface which could be mown variable, some years more and some years less. The acts of Moody above specified were open and visible and so far notorious that the place upon which they were done was sometimes designated "Moody's meadows." No person except Harvey Moody cut or took grass from these premises before the year 1880. The amount so taken varied greatly in different years, the largest quantity being from eight to twelve tons. The grass was so cut in August and Septem-

ber and taken away in January or February of each year. No ground was ever broken upon the premises, nor any acts done by Moody upon them, except as above found. No person was, in fact, upon the premises for any purpose during the month of October, 1879.

XII. About the year 1876 Christopher F. Norton gave to Harvey Moody verbal license to cut and take away the grass from this natural meadow in consideration of the agreement by Moody to look after trespassers on township 24. Thereafter the acts done by Moody hereinbefore found were done under such license. Prior to the giving such license Moody had entered upon the premises and cut and carried away the grass without claim of any right so to do and without asserting or intending to assert any claim to the same as against the owner. His acts were simple trespasses. The license so given to him included no right to occupy the land, but was a definite license for the definite purpose specified, and no other was claimed or exercised by Moody. It gave him no right to cultivate, to inclose, to possess the land or to build upon it. All work done by Moody on the premises related solely to his convenience
31 and profit in exercising the specific license given and was of no substantial character or benefit, nor was it with any claim to the use of the land as such or for purposes of any occupation thereof.

XIII. The premises described in the complaint in this action, being the same mentioned in finding I, above, were not, nor was any part thereof in the actual occupancy of any person on the 12th day of October, 1879.

XIV. A short time before the commencement of this action the defendant entered upon the premises described in the complaint, claiming to own the same, and cut and removed therefrom logs to the amount of 1,250 standards of the value of one dollar per standard, to plaintiff's damage, $1,250. The logs so taken were the same replevined in this action and afterward reclaimed by the defendant and disposed of by him.

And I do deduce therefrom the following

Conclusions of Law.

I.

The sale by the comptroller of the State of New York of the premises mentioned in the above finding of fact, numbered I, made October 12, 1877, as found in the above finding of fact numbered VI, and all proceedings prior thereto from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served, according to the provisions of chapter 427 of the Laws of 1855, and all laws directing or requiring the same or in any manner relating thereto by virtue of the rule of evidence and limitation prescribed by chapter 448 of the Laws of 1885.

II.

At the expiration of the two years allowed by law for re-
32 demption from the comptroller's sale of October, 1877, no person was in actual occupancy of the premises so sold or any part thereof, and no person was entitled to the notice prescribed by section 68 of chapter 427 of the Laws of 1855.

III.

At the time of the commencement of this action, and of the entry and cutting of logs by the defendant as found in the above finding of fact numbered XIV, the plaintiff was the owner in fee of the premises described in the above finding of fact numbered I, and constructively in the possession thereof by virtue of the comptroller's deed mentioned in the above finding of fact numbered VI.

IV.

At the time of commencement of this action and of the entry and cutting of logs by the defendant, as found in the above finding of fact, numbered XIV, the defendant had no title to the premises described in the above finding of fact numbered I, and no right to cut logs thereon, and no right to the possession of the logs so cut therefrom.

V.

The plaintiff is entitled to judgment in this action against the defendant for the recovery of the value of the logs cut and disposed of by the defendant, being the sum of $1,250, with costs.

And I do hereby direct judgment accordingly in favor of the plaintiff and against the defendant for the sum of $1,250 damages, together with the costs of this action.

RICHARD L. HAND, *Referee.*

Fees	$510 00
Disbursements	40 00
Total	$550 00

Dated April 27, 1891.

33 N. Y. Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* BENTON TURNER. } Judgment.

This action having been brought in replevin for a lot of logs in the possession of the defendant and claimed to be owned by the plaintiff, and to have been cut from the land of the plaintiff, and the issues therein raised by the complaint and answer having been referred for final determination to Hon. Richard L. Hand, an attorney of this court, residing at Elizabethtown, Essex county, N. Y.,

as referee; and the matter having been heard by him and the evidence taken before him; and he having rendered his report herein, which has been duly filed in the office of the clerk of Franklin county, and which bears date April 27, 1891, and the referee having found the value of the property to be twelve hundred and fifty dollars, and also having found that said property is the property of the plaintiff herein, and that the said property having been taken by the defendant into his possession after a writ of replevin had been served and the property described in the complaint taken by the sheriff of the said county of Franklin, and the said property now being in the possession of the said defendant, or having been disposed of by him, since the date of the return by the sheriff of the property to the possession of the defendant, and the said referee having found that the plaintiff was entitled to recover said property or damage in the sum of twelve hundred and fifty dollars and costs, and disbursements in this action, and the said costs and disbursements having been taxed at $940.35, therefore it is adjudged
34 that the plaintiff, The People of the State of New York, recover of the defendant, Benton Turner, the possession of the personal property described in the complaint, to the sum of twelve hundred and fifty dollars and interest thereon, from the date of said report, to wit: the sum of eight dollars and twenty-five cents in case the delivery of said property cannot be had; and also, that plaintiff recover the sum of nine hundred and forty dollars and thirty-five cents in addition thereto, as costs and disbursements in this action, amounting in the whole to twenty-one hundred and ninety-eight dollars and sixty cents ($2,198.60).

N. M. MARSHALL, *Clerk.*

Judgment entered and roll filed June 6, 1891.

N. Y. Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
BENTON TURNER. } Exceptions.

The defendant hereby excepts to the report of Richard L. Hand, Esq., the referee before whom this cause was tried, filed with the clerk for Franklin county on the 29th day of April, 1891, in the following particulars:

First. To so much and such part of the 11th finding of fact as finds or decides that "no ground was ever broken upon the premises, nor any acts done by Moody upon them except as" stated in the previous portions of the said finding. And also to so much and such part of said finding as finds that "no person was in fact upon
35 the premises for any purpose during the month of October, 1879," upon the ground that each of said parts and portions of said finding excepted to, as aforesaid, is without any evidence tending to sustain it.

Second. To the 12th finding of fact, and to each and every por-

tion thereof, upon the ground that said finding of fact is without any evidence tending to sustain it.

Third. To the 13th finding of fact, and to each and every portion thereof, upon the ground that said finding is without any evidence tending to sustain it.

Fourth. To the 1st conclusion of law and each and every part thereof.

Fifth. To the 2d conclusion of law and to each and every part thereof.

Sixth. To the 3d conclusion of law and to each and every part thereof.

Seventh. To the 4th conclusion of law and to each and every part thereof.

Eighth. To the 5th conclusion of law and to each and every part thereof.

The defendant further excepts to the refusals of the said referee to make certain findings of fact and of law which were duly requested from him by the said defendant, as follows:

First. To his refusal to find the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 15th, 17th, 18th and 19th requested findings of fact, and to each of said refusals separately, upon the ground that such requested findings of fact and each of them, were duly established by uncontroverted evidence.

Second. To his refusal to find the 23d requested finding of fact, and also to his ruling thereon that "plaintiff's deed is conclusive evidence to the contrary," upon the ground that the finding
36 of fact requested was duly established by uncontroverted evidence, and because the said ruling that plaintiff's deed is conclusive evidence, is a finding of law and as such erroneous.

Third. To his refusal to find the 24th requested finding of fact, and to his ruling thereon, that plaintiff's deed is conclusive evidence to the contrary of said request, upon the ground that said requested finding of fact was established by uncontroverted evidence, and because his ruling that plaintiff's deed is conclusive to the contrary, is a finding of law and as such is erroneous.

Fourth. To his refusal to find the 25th finding of fact and to his ruling that "plaintiff's deed is conclusive evidence to the contrary" of said request, upon the ground that said requested finding of fact was established by uncontroverted evidence, and because the ruling that plaintiff's deed is conclusive evidence to the contrary, is a finding of law and as such is erroneous.

Fifth. To his refusal to find the 28th and 29th requested findings of fact and to each of such refusals separately, upon the ground that said requested findings of fact and each of them were duly established by uncontroverted evidence.

Sixth. To his refusal to find the 2d proposed conclusion of law.

Seventh. To his refusal to find the 3d proposed conclusion of law.

Eighth. To his refusal to find the 4th proposed conclusion of law.

Ninth. To his refusal to find the 5th proposed conclusion of law.

Tenth. To his refussl to find the 6th proposed conclusion of law.

Eleventh. To his refusal to find the 7th proposed conclusion of law.

37 Twelfth. To his refusal to find the 8th proposed conclusion of law.

Thirteenth. To his refusal to find the 9th proposed conclusion of law.

Fourteenth. To his refusal to find the 10th proposed conclusion of law.

Fifteenth. To his refusal to find the 11th proposed conclusion of law.

Sixteenth. To his refusal to find the 12th proposed conclusion of law.

Seventeenth. To his refusal to find the 13th proposed conclusion of law.

Eighteenth. To his refusal to find the 14th proposed conclusion of law.

Nineteenth. To his refusal to find the 15th proposed conclusion of law.

Twentieth. To his refusal to find the 16th proposed conclusion of law.

Twenty-first. To his refusal to find the 17th proposed conclusion of law.

R. CORBIN,
Attorney for Defendant.

To Rosendale & Hessberg, Albany, N. Y., attorneys for plaintiff.

GENTLEMEN: Please take notice that the within notice of exceptions to the report and findings of the referee in the above-entitled action, and to the refusals of the referee to make findings of fact and of law, as requested by the defendant, has been filed in the office of the clerk of Franklin county, this — day of June, 1891.

R. CORBIN,
Defendant's Attorney.

38 Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
BENTON TURNER. } Notice of Appeal.

To Rosendale & Hessberg, attorneys for plaintiff, and to the Franklin county clerk:

Please take notice that the defendant appeals to the general term of this court from the judgment entered herein June 6, 1891.

June 23, 1891.

R. CORBIN,
Defendant's Attorney.

New York Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
BENTON TURNER. } Case.

Statement under Rule 41.

This action was begun April 11, 1887. The answer was served April 30, 1887. No change of parties has taken place since the action was begun.

39 *Case.*

The case came on for trial at Saranac Lake, Franklin county, before Hon. Richard L. Hand, as referee, on February 19, 1889, and was continued upon subsequent days.

The plaintiffs appeared by their counsel, S. A. Kellogg and Albert Hessberg. The defendant appeared in person and by his counsel, George H. Beckwith, Henry E. Barnard and Frank E. Smith.

During the trial R. Corbin, Esq., was substituted as attorney for defendant, in place of Beckwith, Barnard & Wheeler.

The following evidence was offered by plaintiff:

A deed based upon the tax sale of 1877, dated June 9, 1881, from the comptroller of the State of New York to the People of the State of New York, conveying several pieces of land, and among them the whole of the southeast quarter of township 24, great tract one, Macomb's purchase, Franklin county, New York, which deed was recorded in Franklin county clerk's office, June 8, 1882.

Deed received in evidence.

S. F. GARMON, called on behalf of plaintiff, testified as follows:

My business is warden of the forest preserve, and I am in the employ of the forest commissioners, and have been for about three years; the lines of the southeast quarter of township 24, great tract, No. 1, Macomb's purchase, county of Franklin, have been shown to me; they were shown to me by the defendant Turner; the timber was cut off said lot within two or three years; the defendant showed me the timber; I was there with the defendant in January of the year the timber was cut; the lumber or tim-
40 ber was cut in January, 1887; the defendant told me that he was doing the cutting and lumbering in that section—the whole of it; Mr. Turner told me where the southeast quarter of township 24 was, and showed me the line.

Cross-examination:

He claimed the land—claimed it as his property; said that he should hold it—the right to cut; I said it belonged to the State; I said it was State land and the chances were he would have to defend himself.

It was agreed and stipulated and consented to by the defendant and plaintiff that the lumber cut on the southeast quarter of town-

ship 24 was twelve hundred and fifty standard logs, of the value of one dollar per standard, and that, if plaintiff is entitled to recover, the damages are $1,250. It was also admitted by the defendant that a writ of replevin was issued, and that the logs were taken back by the defendant, and that defendant has disposed of them.

Plaintiff rested.

Defendant to maintain the issues upon his part offered the following documents, all of which were received in evidence and marked as exhibits:

1. Record of a deed from the comptroller of the State of New York to Samuel W. Barnard, based upon the 1859 tax sale, dated December 27, 1864, conveying southeast quarter township 24, great lot one, Macomb's purchase.

2. Record of a deed from Samuel W. and F. J. Barnard to Christopher F. Norton, dated November 25, 1872, recorded in Franklin county clerk's office on January 22, 1873, conveying southeast quarter of township 24, great lot 1, Macomb's purchase.

3. Record of deed from comptroller of State of New York to Christopher F. Norton, based on 1866 tax sale, dated Janu-
41 ary 22, 1873, recorded in Franklin county clerk's office February 25, 1873, conveying same land as above.

4. Judgment-roll in an action brought in the supreme court of the State of New York by John E. Spicer and John D. Spicer against Christopher F. Norton. Judgment entered in Rensselaer county, and roll filed January 20, 1877, amount of recovery $59,173.28.

5. Transcript of docket from Franklin county clerk's office showing the docketing of said Spicer judgment in said county on June 21, 1877.

It was then admitted by both parties that Christopher F. Norton died intestate in 1881 or 1882, leaving a widow, Charlotte M. Norton, and eight children, namely: Mary A. Thomas, Helen C. Norton, Sarah M. Norton, Carroll F. Norton, Benjamin Norton, Henry Norton, Christina Norton and Christopher F. Norton, the last two being infants and all the others of full age.

6. Order of supreme court made April 23, 1887, allowing execution to issue upon the Spicer judgment.

7. Decree of the surrogate of Clinton county made and entered April 18, 1887, allowing execution to issue on Spicer judgment.

8. Execution on Spicer judgment issued to sheriff of Franklin county, April 28, 1887.

9. Sheriff's certificate of sale dated June 18, 1887, showing sale of southeast quarter, township 24, grant lot 1, Macomb purchase, to Benton Turner for $6,000.

10. Sheriff's deed dated February 19, 1889, conveying to Benton Turner southeast quarter township 24.

11. Two quitclaim deeds from all the adult children and
42 heirs-at-law of Christopher F. Norton to John B. Riley, both dated December 16, 1886, and conveying all their interest in southeast quarter of township 24.

12. Deed from John B. Riley to Benton Turner dated December 27, 1886, conveying southeast quarter of township 24.

13. Abstract of title made and certified by clerk of Franklin county showing record title to southeast quarter of township 24.

14. Certified transcript from the sales book in the office of the comptroller showing that the southeast quarter of township 24, great lot 1, Macomb's purchase, was sold on October 12, 1877, to the State for the unpaid county and highway taxes of 1866 to 1870, both inclusive, and school tax of 1869 and 1870.

Defendant then called SMITH M. WEED, who being duly sworn, testified as follows:

I reside in Plattsburgh, N. Y., and am a counsellor of this court; I was acquainted with C. F. Norton in his lifetime; prior to his death was for many years his counsel—practically from 1860, up to the time he left, or just before he left; I remember going with him onto this township 24 a good many times; my impression is that I went before he got his deed from the comptroller; he claimed to own three-quarters of township 24 prior to the comptroller's deed; he claimed to own from the old Gilchrist title; he claimed to own all except the southwest quarter, as I recollect it, and had for some years; some time between 1870 and 1876 I heard a conversation and agreement between Norton and a Mr. Moody as to leasing the southeast quarter; I think it was some time between 1870 and 1876; I am not able to remember when it was exactly; the talk was between Norton and Moody—a middle-aged gentleman named Harvey Moody; that is my recollection of it; the
43 talk was about the occupancy of the southeast quarter of township 24; Norton wanted me to see about it, and he wanted to make an arrangement with Moody, and they did make an arrangement by which Moody was to look after his lands in that township, and see that there were no trespassers; and in consideration of that he, Norton, agreed to give him a lease of the meadows that he occupied on the southeast quarter of township 24; and I took a memorandum of it; and my recollection is that I afterwards drew a lease and gave it to Norton after I got back; that occurred either at the Prospect house or somewhere near Big Clear pond; Norton had a house there where there was an old saw-mill; my recollection is that it was at either one of these two places that that conversation occurred; he agreed that Moody should occupy and use the meadows, and in consideration of Norton's permission for his doing so he agreed to look after trespassers on township 24; Moody said in the conversation with Norton that he had used the meadows for a good many years and had made them what they were and that he wanted a lease of them; and then Norton made a lease to him as I have stated; I understood from the conversation that there were a good many acres, but I don't remember how many; I did know at the time, for I took a memorandum of it; I understood from the conversation in a general way that Moody had used the land and been in the habit of cutting grass, and that he ought to have a right to it now if they were to be leased to anybody.

On cross-examination Mr. WEED testified as follows:

My recollection is that the talk was about the southeast quarter; my impression was that all the meadow was in the southeast quarter and always has been, and I never heard it questioned till a day or two ago, but I don't know anything personally about it; I never knew anything about the intervale land; I had an idea that it was originally wild grass; I think the old man, Moody, went on to quite an extent telling Norton what he had done, and that is the
44 only information I had about it; nothing was said about ploughing that I recollect at that time; I don't know whether the lease was ever signed; I drew the lease and gave it to Norton; I don't know that Moody ever went into occupation under such lease, except the talk between them and the fact that I drew the lease; they agreed to it there and I agreed to reduce it to writing, and I did so and gave it to Norton; I did not understand that Moody lived on the land; I did not know at the time where he lived; I got an impression it was two or three miles away; I did not understand that the meadows were fenced.

On the redirect Mr. WEED testified as follows:

I have no recollection of hearing a talk between Moody and Norton except that one time, and I don't know that there was anything said at that time about building a dam; Moody in the conversation said a great deal about what he had done cutting brush and so on, and had mowed it a good many years.

JAMES PHILBROOK, called by the defendant, testified as follows:

I am fifty-two years of age and reside in Harriettstown, and have for twenty-five years; I am acquainted with the southeast quarter of township 24, and have been acquainted with it twenty-three or twenty-four years; I first became acquainted with it through guiding parties there fishing to a brook called Rogers brook, and more recently have been there helping to draw hay off the meadows in the winter time; I know where the county line crosses the meadow, and I know where the division line is; I know by hearsay that such a line was the line; the line is marked by blazed trees, and the trees are blazed on the county line, and the south line is blazed through in the same way; I have been acquainted with this land so as to know where the lines crossed for six or seven years;
45 I don't know as I can swear positively as to the years when I first knew anything about hay being cut there or drawn from there; as far back as twelve or fifteen years ago I bought some hay from Mr. Moody that was on the meadows, and went in and drew it off; that was Harvey Moody; I recollect him, and the time of his death; I was present when he died; it was, I think, the 23d day of April, 1880; I had been acquainted with this meadow prior to that, and with the fact that hay was cut on it; I bought and drew hay from there before 1880; I think I had some hay from there in 1877 or 1878; it was wild hay, such as grows on beaver meadows there; there was redtop on it, but no timothy nor herdsgrass; I have been a farmer; redtop does not grow on these beaver meadows unless it is seeded or put there, usually; I do not know of

this land having been ploughed or tilled by Mr. Moody; I saw hay standing on the meadows; saw Mr. Moody there at work, cutting hay; I never saw him burn the meadow over; I saw the meadow burning there in 1875 or 1876; I cannot say whether it was burned over the year before Moody's death; he occupied it the year before he died; I know there was a dam put in there prior to Moody's death; the dam was so constructed that it might have flooded this beaver meadow; there were boards put on to flood the meadow; when the boards were off the meadow would not be flooded; when they wanted to flood the meadow they would have to put the flush boards on; I never saw Moody cutting brush or stubble in the meadow, but I know that brush or stubble was cut by somebody; this cutting of brush or stubble appeared to have been done about every year when they cut hay there; somebody did it about every year when they cut hay; when this hay was cut it was stacked on the meadows; it was removed in the winter time after the ice had formed; I do not know of any one except Mr. Moody cutting and taking hay from that meadow; I do not know of any interference or disturbance of his occupancy and use of those meadows; I am the husband of Polly Philbrook, who was a daughter of Harvey Moody.

46 Defendant offered in evidence a deed from Harvey Moody and Lydia Moody, his wife, to Polly Philbrook and Fayette Moody of Harriettstown, dated April 15, 1880. Deed received, marked Defendant's Ex. D.

The land described and conveyed in this deed is the same meadow as that occupied by Moody; since this deed was given to my wife and Moody, my wife and Moody and myself continued to occupy and take care of the premises the same as old Mr. Moody did.

Cross-examination:

I do not know the actual measurement by acres of these meadows; I never measured them; I never ran through the division line between the two quarters; I know where they say the division line crosses these meadows; I know where the line which was pointed out to me as the division line crosses these meadows; the brook called the Rogers brook runs into both quarters; the brook in its general course runs about northwest; the dam falls on the upper quarter—the northeast quarter—I should say ten or twelve rods east of the line in the northeast quarter of the township; I could tell better by the map; the dam is east of the division line; the division line runs east and west; the dam is south of the division line; I correct myself; the dam is located on the southeast quarter, ten or twelve rods from the line; the brook before it comes to the division line does not run at all in the northeast quarter; it is altogether in the southeast quarter until after it passes the dam to the division line; some five or six acres of these meadows lie south of the division line, and about three or four acres lie north of the division line; all together some eight or nine acres, I should judge; I made an affi-

davit to the comptroller that there was about twenty-five acres of land in the Rogers Brook meadow in 1888; I had reference to what was actually mowed; to the extent of the meadows; I should think there would be about two-thirds of the meadows south
47 of the division line, and the other third north of the division line: I estimate the number of acres of the meadows south of the division line to be five or six; I make a distinction between mowing land and meadow land in this case; if it was all mowing land from one side to the other it would be a good deal larger than it is now; there is not as much meadow now as there ever was; there is not as much meadow now as there was in 1879; I should think it would be nearly a third more in 1879 than now; this is owing to the growth of bushes and alder since then; I never knew the dam was used for any other purpose than flowage of the meadows; no timber or logs is run on the brook; this meadow land is situated in a natural swale of low ground, not very boggy; there are some stumps on this meadow land; I should say the stumps of first-growth trees; the character of the stumps indicates tamarack timber; the stumps are not very numerous; quite large; I should think the original growth of the trees on this meadow land was a cedar and tamarack—soft timber; I don't know when that was cut off; I don't think there was ever much of it cut; the stumps appeared as though the trees had died and fallen, most of them; once in a while I saw one that looked as though it had been cut with an axe; I only guess that cedar stood there because there is cedar all around the edges; this meadow land does not appear to have been overflowed much; the soil is a kind of dark loam or muck; it does not appear to have been turned over by the plough or spade; the upper meadow is inaccessible in summer time with teams; only accessible in winter time; no highway passes near it; it is some three miles from the highway; nearly three miles from any residence; the nearest residence is Mr. Ames'; Harvey Moody lived six miles away from it; I lived six miles away from it when I received the deed from Harvey Moody; I resided in Franklin county; Harvey Moody resided in Essex county; I do not recognize the photograph shown me as a photograph of any portion of
48 these meadows; I know where they say the corner is in the division line between the two divisions; I know where it has been pointed out to me; I cannot say whether it is near the two birch trees that appear in the front of the photograph; I do not recognize these trees as blazed trees; I think I recognize the knoll upon which these birch trees grow from this photograph; I have been there; that knoll is from ten to twenty feet above the meadows; the meadows come to within ten or twelve rods of the birch trees; I do not know that the two birch trees in the photograph are the trees which indicate where the division line strikes the county line; they may be near the line, but I cannot swear to it by the looks of the trees; I do not know that anything indicates where the division line between the northeast and the southeast quarter of township 24 strikes the Essex County line; the meadows are near the supposed northeast corner of the southeast of township 24; I

simply recollect that the division line crosses the brook; there used to be some blazed trees there that they said was on the line; I do not know but they are there yet; I have seen them sometimes when I have been there; I don't know particularly when; I don't know how many trees were there at the brook to indicate where the line was; I have seen two—one on one side of the brook, and the other on the other side, a short distance apart; a few rods; six or eight rods, in my judgment; I think one of these trees was a spruce tree and the other a balsam; they were smallish trees, anywhere from four inches up to six or eight; they had the blaze of an axe; I don't know whether they had it on both sides or not; line trees generally have a mark made on both sides where they stand right on a line; where they stand a little on one side they don't generally mark but one side; they mark the side nearest the line when they stand near the line; such a tree is generally called a line tree, except on a corner; they are called witness trees; I could not say whether these trees were spotted on both sides or one, or on which side that were spotted; I never fol-
49 lowed the lines through; never had any interest in it and had no occasion to; I cannot say that I know the exact location of the line; I was never there with any surveyor; I do not know when the line was made or who made it; I do not know how old these trees were; they were quite old looking; I cannot state from my own observation that the timber on these meadows were ever cleared away by any human being and made into meadow; it has been cleaned up a good deal, I should say, since Mr. Moody began to cut hay there—more especially since he took pains to burn it over and cut some of the brush—alders and smaller brush that grew on these meadows; I do not know of any one doing anything upon these meadow lands prior to Mr. Moody; there is no indication of a shanty or house being built; I cannot say what amount of hay has been cut in any one year prior to the time of its being cut when my wife purchased it; all I can judge about is what has been cut since; in my judgment I should say there was eight or nine tons cut there in 1876; some years not so much; some years better than others; I never cut any there before my wife purchased it; I drawed some from there but never cut it; I made an affidavit in 1887 and it is correct in regard to the hay cut on these meadows; I made an affidavit that I had cut wild beaver meadow hay on the southeast quarter of township 24 on Rogers brook for the last six years previous to 1887, the first year being 1881; I think I cut about four tons a year; I made this further statement in the same affidavit: "I didn't cut this hay by or under any agreement with any one; I did not suppose there was any harm in cutting said hay;" I presume this is true; I also said in the affidavit that I never made any improvements on the southeast quarter of township 24, and that I had never been notified as an occupant to pay taxes on said land or any part of it; it is true that I never paid any taxes and was never requested to; I also stated in the affidavit that Mr.
Van Buren Miller said to me verbally in the summer of 1885
50 that if I cut more hay on the meadows above mentioned I

would have to pay something for the same; I replied that it was all that it was worth to cut and draw the same; I have never paid anything for the hay; that is all true; I also stated in the affidavit, "I never cut any hay or did any other act for the purpose of making a claim or making a title for myself or any one else for the southeast quarter of township 24, 'McComb's purchase, great tract 1;'" that is also true; the grass that I speak of as growing on these meadows was rather short grass; I presume a foot high; it seemed to be natural grass and grows on all the swamp lands in this region; I said that I understood that redtop did not get into meadows there unless it was seeded; I said that as I understood it; I have no personal knowledge as to whether that is the fact or not; I have known of redtop being seeded on meadows in this section; market hay in this section of the country is timothy and clover; redtop and wild grass is not considered market hay; they use a good deal of it there; it is not market hay; it is used for stock purposes; I do not know that redtop is a species of wild grass; I don't know whether the seed for redtop has to be sowed or whether it comes up naturally.

On redirect examination Mr. PHILBROOK testifies:

Mr. Albert Turner, who was connected with the forest preserve as I supposed, got me to make the affidavit; he said his object was that the affidavit be made to show that I did not own any land there; simply that I had a right to cut the hay, and I supposed I made an affidavit in accordance with that; he read the affidavit to me, or pretended to read it to me; I did not read the affidavit myself; when I stated that I did not cut the hay under any agreement or contract with anybody, I meant that I had a right to cut the hay according to the agreement with Mr. Moody; I had a right to cut the hay under that deed; the hay grown on these meadows is the kind of hay sold in this country more or less.

51 DANIEL AMES, called on behalf of the defendant, testified as follows:

I reside in North Elba, three miles from the county line between Franklin and Essex counties; have lived there something over thirty years; am acquainted with the southeast quarter of township 24; I think the first time that I undertook to trace the lines to any particular part was in 1856; not all of them; in that year I was on there with another party; we were sent to find the division line between the southeast quarter and the southwest quarter; we started from the northeast corner of the southeast quarter; we run through to the division corner of these four lots in the centre; then we didn't find any other trees that showed it was ever run through to go west, and we found no line running from there south; that was in 1856; we found the division line between the southeast and southwest quarter; I have been on the county line; that was the south line of the township; I don't know as I have been on the county line but once; that was in 1862; then I was there with Mr. Tefft; I am acquainted with the meadows there; I passed them a

good many times; I was there on the premises the first time, I should think, in 1858; I was acquainted with Harvey Moody; I bought hay of him off this southeast quarter; I think it was in 1875; I bought one stack; the character of the hay was different kinds, such as grows on low meadows; some of it fallow meadow, but I suppose redtop; I have gone through those meadows drawing logs, and I should think it was a hundred rods through them; I saw the dam on the brook; Mr. Moody showed me the dam; Mr. Norton used to employ me to look over his lands; he said that he had given Harvey Moody the privilege of going there—I don't know in what way—to cut the hay; he never told me what the bargain was; he, Norton, wanted to know if Moody had burned the timber, and if the fire had got out so as to do any damage; Norton asked me if there was any danger of fire coming out from the
52 clearing that land on the southeast quarter; nobody occupied any of this meadow land from 1862 until Mr. Moody's death except Mr. Moody, so far as I know; I saw Moody's folks drawing hay away from there; I was there during the winter lumbering; I recollect where the dam was; I am acquainted with the lands; the dam was on the southeast quarter wholly; the dam was built by Mr. Moody; he said so; I think it was built not far from 1874 or 1875; it was not a great while before Norton did business there; I saw Moody draw hay from the meadow frequently; I never saw him in it; I was most always in this section of the country in the lumber business—all along from about 1850 to 1870; my lumber road went through the meadows; I used these lumber roads in 1866, 1867 and 1868; I went through the meadows in 1869; I bought a stack of hay there in 1875; a good deal of that kind of hay is bought and sold like other hay in the community; I know the alders and stubble and brush were cut and taken away from these meadows; but I don't know who did it; when I first saw the meadow it was almost all brush.

Cross-examination:

(Photograph shown witness.) I do not recognize that photograph as a photograph of one of these meadows in question; those meadows in the days I speak of were covered in spots with brush and alders; there were places near the brook that were never cleared up, and the meadows were, when I first knew them, covered in spots with alders and brush; the brook runs right through the meadows; I do not know whether there was any original timber on these meadows there; there were no indications of it that I know of; when I first knew the meadow it was mostly alders; there was some tamarack growing on it, but most of it dead; that was as far back as 1858; somewhere about 1857 or 1858 I was on there and drew logs through these meadows; I have no recollection of seeing any hay cut there at that time; I don't know as there was the same character of grass growing there at that time as when Moody occu-
53 pied it; the first time I was there was in the winter time; I have no recollection of seeing any stack of hay there until some-

where along about 1865 or 1866; all the occupation that I know of, and that causes me to make up my mind that it was occupied at all, was simply the cutting of the brush and alders; I never paid any attention to the number of acres cut over in this way and used in this manner; I have heard there was about nine acres; I should suppose there were as many as ten or twelve acres, but I was not looking to see how many there were; these meadows north of the line run through into Essex county; somewhere about an acre, I should judge, of the meadow is in Essex county; I am a farmer; as to redtop, I suppose it is tame grass and it is sometimes sown; I have known people in there to sow it; I don't think it would come naturally into the soil after the soil had been moved over and the flat grass cut for a number of years without some seed of some sort; I have no knowledge from observation or experience on the subject; the flat grass comes from the same cause that trees come from; perhaps the redtop might come in the same way that the first grass does; I have redtop on my farm; never have sown it; the grass seeded here when people cultivate their land is mostly timothy and clover; I have known redtop sown occasionally; redtop when it comes into the soil stays like wild grass; it is perennial; herdsgrass or timothy does not stay in the soil like wild grass or like redtop does; it runs out and other grass takes its place; I think redtop would be apt to stay in the ground longer than herdsgrass; I think the redtop would be apt to stay longer in the ground than herdsgrass; I was across these meadows this fall; I have looked upon these meadows from near the corner where the division line strikes the county line.

Witness again shown photograph, and asked if he recognized the two birch trees as near the corner, and said: There used to be one there; when I last stood on that corner when I was there
54 you could not look down on the meadow on account of the trees; when I first went to that corner you could not see the meadows, because there was a quantity of bushes between you and the meadows; I am not able to state of my own knowledge that there was anybody on those meadows in 1879 of 1881 for any purpose.

Redirect examination of witness:

I have used redtop on my farm; fed it out there; the redtop that I bought in 1875 from Mr. Moody was fed out on my farm; I never was acting for Mr. Norton as agent, but I was acquainted with the land and drove around through that country; in 1866 I went for Mr. Norton to look up some lots for him, and went through these meadows; he sent me there before he bought it.

ROBERT MOODY, called by the defendant, testified as follows:

I am a son of Harvey Moody; he died in April, 1880; I am acquainted somewhat with these meadows spoken of here in the southeast quarter of township 24; I drew hay from these meadows for Mr. Moody in the year 1879; I never cut any; I drew about twelve

tons; I drew the hay along in January and February—I couldn't say which—of 1880; I drew before that time two or three years right along; I helped to draw it each year; drew it to my father's place; that is six miles from the meadow; I do not think the hay we cut on Kinneys brook was as good as this was; I drew the hay for my father probably a month and a half before his death; I drew the last of it in 1880; I drew hay also in 1879; I recollect the time because I know the man that helped draw it; the crop of 1879, which I drew away in 1880, it took us about two weeks to draw it, two trips a days, double team; I know that my father burned the meadow over; I could not say what year; it was two or three years before he died; I helped him burn it one spring three years before he died.

55 Cross-examination:

I don't know anything about the division line between the two quarters; I know where the county line is; I think there was some hay drawn on each side of the division line, if I am not mistaken; I am twenty-four years old; in 1879 I was fourteen years old; I never cut any hay there myself before my father died; I have since; the hay cut there was put up in stacks; I could not say how many stacks; I think the hay cut in 1879, and prior to that time, was stacked on both sides of the division line; I remember there being a dam there, but I don't remember who built it; I do not recognize these meadows from the photograph shown me; there were alders and brush in the meadows scattered around the same as appear in the photograph at the time when I hauled hay away from there; I don't know of Mr. Moody ploughing those meadows or sowing any seed there; I suppose the character of the hay there now is the same as it was at the time I began to work there; a pretty good deal of it redtop; it is what we have to feed our stock; the proportion of wild grass and redtop is about half and half; I don't remember seeing any herdsgrass in it; I haven't much of an idea how many acres there are; I should think there were ten; I have never mowed it but one summer when I helped my brother.

Milton Smith, called for the defendant, testified as follows:

I am forty-three years of age; I live in the town of North Elba, in Essex county; the county line is one of my lines on the west side of my lot; I am somewhat acquainted with the southeast quarter of township 24; have been acquainted with it about twenty years; there was a beaver meadow there when I was first acquainted with it; Harvey Moody claimed to be occupying it at that time; he continued to occupy it until the year of his death; I know there is a dam there; as to the seeding of it, they stopped at my
56 landing once in 1876 with a bag of seed, that is to say, Harvey Moody and other parties, I don't recollect who; I saw a bag with them, but did not see what was in it; they went in the direction of the meadows.

Q. If they stated that they were going to seed those meadows, state what they said in regard to it.

Objection as immaterial, irrelevant and improper; not a fact, and hearsay; objection sustained and exception.

I saw smoke after Moody left on this land; the smoke was in the direction of the land; I think it was in 1876; I have cut and hauled hay from the land; prior to the death of Mr. Moody I helped to draw hay from there; I think it was in 1868—twenty years ago; I bought wild hay of Harvey Moody, and drew it from the meadow to my barn; I saw Harvey Moody cut and draw hay from there the year before he died; I was up and saw them cutting hay and stacking it; Harvey Moody was there and some of his boys; I think his boy Fayette was with him; I have seen them off and on for different years, cutting the grass; I have seen them about every year drawing and nearly the same number of years cutting; there was some redtop in the grass; redtop is not very natural in these meadows, only as it is put in in seed; that grass is bought and sold in that vicinity for feeding cattle, and not for horses.

Cross-examination:

I think it was the year 1876 that I saw Moody going over to these meadows with the bag; I had mowed grass there prior to 1886, namely in the year 1868; I bought hay from there some two or three years prior to Moody's death; the grass I bought was of the same character as I mowed in 1868; saw no difference in quality; I do not recollect there was any redtop in the grass in 1868; there was no redtop in the grass which I bought; I
57 should think there was something very close to 25 acres in the intervale; I should judge there was something near ten acres cut over from my earliest recollection; I know where the division line is between the two quarters; north of the division line some years more and some years less was cut on account of the water backing in the river; I do not know how many acres there are on the north quarter; I should say five or six acres, or in that neighborhood, and somewhere about five acres cut north of the division line between the two quarters; I don't know how much in Essex county; I think there is some; very little; there was rather more mowed over in 1868 than in the year I was there last; there was a meadow down by the division line—a small meadow, I should say, that had increased since 1868; I think there was more there a year ago than there was in 1868; possibly an acre more.

ALBERT GOODSPEED, called for the defense, testified as follows:

I live in North Elba, about three miles from this southeast corner of 24; my mother married Harvey Moody; I have been acquainted with this southeast quarter since 1877; I recollect the meadows there and that Mr. Moody cut grass on it and that he drew it away; I have worked on it myself; worked on it in the years 1877, 1878 and 1879; I was mowing grass and helping to haul it; I helped Mr. Moody burn it over in the years 1877 and 1878; I know there was a dam there; I know Mr. Moody fixed the dam; I helped him

do it; it was in the year 1877; the character of the grass that grew there was redtop, fallow meadow; it was flat grass and very little herdsgrass scattered through it; I should think there was nine or ten acres cut over.

Cross-examination:

When I speak about nine or ten acres I mean all that was mowed over; we generally cut it in August and September; the dam is not very large nor very long; it may be eight or nine feet at the
58 top and about four feet high; it was made of nothing but poles laid across and some driven in, with some brush put in and some few pieces of slabs; it was an old concern when I saw it; when my father fixed it, it raised the brook so as to flood the meadow in some places, and some places it did not; it flooded a half acre or more; father burned the old stubble and dry brush and stuff; the dry brush that was standing; there was quite a lot of it; there was green brush standing, scattered over the meadow in places; we mowed around this green brush in some places; the brush was mostly alders; sometimes the alders would not be thicker than your finger, sometimes thicker than your wrist, and six or eight feet high; the meadow was covered in separate bunches here and there; we did not burn up onto the hard land any; the brook is ten or fifteen feet wide; I do not know how much of these meadows lay over in Essex county, or how much lies north of the division line between the two quarters; (witness shown photograph) there are some things on it that look like the meadow; I can recognize the meadow from the photograph; the meadow we have been talking about and the lands that have been cut over; the proportion of the meadow we mowed below the dam might have been five or six acres; the meadow is a long, narrow strip; I do not know how wide; I should think it was eight or ten rods wide on an average; might be one hundred rods long; that is the total both sides of the dam, from the dam to the upper portion of the meadow, is I think, sixty rods; from the dam to the lower portion of the meadow might be forty rods.

Redirect examination:

Mr. Moody stacked the hay three different years after cutting it and left it on the ground; it was not drawn away until the ground froze up.

HENRY WOOD, sworn for the defendant, testified:

I live in North Elba; have lived there fifteen years; it is
59 forty or fifty rods from the Franklin County line where I live; I am acquainted with what is called the Rogers Brook meadows; Harvey Moody occupied them and used them; the meadows he used and occupied are the Rogers Brook meadows; I have been acquainted with them ever since a number of years prior to the war; they are in the southeast quarter of township 24; I know of Mr. Moody seeding these meadows down; helped him to

seed them down; I fetched him grass from Keeseville, from my old farm in Keene; the first seed I fetched was herdsgrass, the next was redtop; I was present and saw it sown, and helped to sow it; it was sown on these meadows in different parts of the meadows.

Cross-examination:

I should say that was two or three years prior to the civil war; Harvey Moody was with me when the grass was sowed; we sowed a half bushel—one peck of redtop and one peck of herdsgrass; one kind of seed one year and the other the next; I cannot say how much below the dam nor how much above; it was scattered around as the case might be; we took the grass seed and sowed it right along; we went over pretty near the entire meadow, both sides of the dam, above and below; there was no dam there at that time; I know where the dam is now; at that time there was a growth of wild grass there; there was blue-jack there; I don't think there was redtop growing there then; I did not notice any redtop at the time we sowed; I am something of a farmer; redtop will come up when it is sowed; I don't think it will come in without sowing; there are some men who do not know the difference between redtop and June red; I do not think redtop will come in unless sowed; that is my judgment; I am not the owner of a farm; I have owned one, eighteen years ago; owned it two or three years; located at Keene; one hundred and four acres; had no redtop on it; I have more or less during my whole life been on a farm at intervals; I mean at intervals and on intervale land; I call low land intervale lands—land that is sometimes flooded, land that naturally raises wild grass; I work every year upon farms; I have worked as a hired man on shares; my age is fifty-nine; I am not a lumberman; I have worked in the lumber woods; I say June grass comes into the ground naturally; the distinction between June grass and redtop is that June grass is a great deal shorter; it is more wiry and short; it looks something like redtop, only nothing near as big; I can tell the difference between them; it is easy to distinguish them; any farmer would know one from the other.

Redirect:

I live on a farm now; have grass on the farm; my wife has a farm in this town.

Recross:

I do not know that any of these meadows were burned over for the purpose of seeding; they did not appear to have been ploughed, or to have been turned over by any appliance; no turf cut; no turning over by the spade; some roots were cut out with an axe where the brush had been cut down; we didn't put the redtop in these spots; we sowed the seed right on top of the wild-grass turf; I do not think that the herdsgrass that we sowed did much; the ground was too wet; no herdsgrass to any amount; the redtop

did well on top of the wild-grass turf; some of this intervale land is boggy and some is not; it is overflooded in certain seasons; considerable water comes down from the hills from each side; it lies then under water, sometimes longer and sometimes shorter, according to the season of the year and the snow we have; in some places it flows over the meadows about every year; from the upper end of these meadows to the lower end I should judge there was about six feet fall; this Rogers brook runs through about the center; maybe thirty rods from where the dam was subsequently built to the lower end of the meadow; I cannot say how far to the upper end; the county line crosses near the upper end of the meadow; a
61 small piece of the meadow is over in Essex county; I do not think there is an acre; I do not know where the division line between the two quarters is; it was never pointed out to me; we did not mow any further than the grass let us; there was no grass on the hard land.

It is admitted that the original records on file in the treasurer's office of the county of Franklin prior to 1872 were burned.

AUGUSTUS TORRANCE, called by the defendant, says:

I am seventy-three years old; reside in Harriettstown, Franklin county; have resided there since 1858; have been assessor of the town of Harriettstown; was assessor in 1867, 1868, 1869 and 1870, through all of those years; was assessor at the time when George Ring was.

Q. During any of those years, 1866 to 1870, state whether you verified the assessment-roll prior to the third Tuesday of August.

Objected to by plaintiff as immaterial and investigation in this line prohibited by chapter 448 of Laws of 1885, and on the further ground that the assessment-roll should be produced, which is the best evidence as to whether or not it is verified.

Defendant replies that said law is invalid by section 1, article 14 of the amendments to the Constitution of the United States; objection sustained; defendant excepts.

Defendant offers in evidence a copy of the assessment-roll of 1867, which plaintiff admits is the copy which was filed with the county clerk for that year, marked "Defendant's C."

Plaintiff objects as last above; defendant replies as before; referee admits evidence for the present.

I was assessor during the time that Mr. John Howes was
62 assessor; the assessors did not meet on third Tuesday of August in the year 1870 to review the assessment-roll; that was the last year that John Howes was assessor.

Plaintiff objects, on the ground that the deed is conclusive evidence of all proceedings prior to the sale; on the ground that it is immaterial; on the further ground it is not shown there was any grievance on the part of any citizen that made it necessary for the assessors to meet; overruled for the present.

In the year 1870 I was at the place appointed to meet, and no one came through the day; no assessor came, and no person came there with any complaint; intervale or swamp grass in Harriettstown is used for feeding stock; I know there is a good deal of it used.

Cross-examination:

It is a fact that this locality was from 1866 to 1870 a wild region and the fact that there were no fences built to surround a person's close or betterment, arose from the fact that it was thinly inhabited; it was not for a lack of fencing timber; it lies at the present day just as it did twenty-five years ago, as far as fences are concerned; that is the wild meadows that I was acquainted with, I mean. No one appeared on the day that I met to hear complaints to the assessment-roll of 1867; no grievance was made known to me as assessor; notices were put up; the only reason I know why my signature is absent from the assessment-roll of 1867 is that it is a copy and I had no business with it, I suppose; I did sign the original; all I can say is that the assessment-roll of 1867 was signed before the third Tuesday of August; I am positive of that from the conversation we had at the time; I was out there and J. Miller was there, and I spoke to Van Buren Miller concerning it, and he said it would save another trip coming out here, and it will not make much difference anyway; don't know as it will make any; and the assessment-roll was signed;
63 both signed at the same time those other parties signed; I did not sign a copy, because I never signed a copy of any assessment-roll; my name is Augustus Torrance; that is not my signature to the copy of assessment-roll shown me; I think that is not the writing of J. J. Miller; I am quite positive that I signed the original assessment-roll before the third Tuesday in August; we had the conversation, as I tell you, so I am positive of it; the fact that I signed the assessment-roll prior to the third Tuesday in August was not called to my attention until now; the thing was never mentioned to me before; this is twelve years ago; the fact has not been talked to me since, prior to this occasion, not till now; I was first interrogated in reference to it the day before yesterday; J. J. Miller is dead; the other assessor was there that year; he is also dead; I am the only survivor of the three assessors; the defendant, Benton Turner, brought it to my attention that we had sworn to the assessment prior to the third Tuesday in August; I recollected it immediately upon his suggesting it; after the assessment-roll was shown to me I recollected it; I had not seen it before that time until now; Van Buren Miller was the justice of the peace before whom I made the oath; I think he is living.

JOHN HOWES sworn for defendant:

I live in Harriettstown, Franklin county; I was elected assessor in 1868 for three years; during that period Mr. Torrance was assessor also; during that period there was one year in which the assessors did not meet on the third Tuesday of August; I think

that it was either in 1869 or 1870 that I did not meet them; I cannot tell exactly.

Defendant offers in evidence documents purporting to be the assessment-rolls of town of Harrietstown, Franklin county, for years 1867, 1868, 1869, 1870.

64 Plaintiff admits that records of the county treasurer's office of Franklin county previous to 1872 have been burned, and admits that documents offered are copies from the town clerk's office.

Documents received for present and marked respectively "C, D, E, F."

Defendant offers to show by witness V. B. Miller that supervisor's warrant attached to Exhibit F bears the genuine signatures of the supervisors of Franklin county for that year, 1870.

Objection by plaintiff; immaterial, irrelevant, incompetent under law of 1885.

Defendant replies as before as to United States Constitution.

Objection sustained; defendant excepts.

Defendant offers to show same as to Exhibit C for year 1867.

Same ruling; exception.

Exhibit C, purported to be verified by assessors 10th August 1867.

Exhibit F had no verification or signatures of assessors.

JOHN RORKE, sworn for defendant, testified as follows:

I will be 70 years old in a few days; I live in Harriettstown, and have for 27 years; I have been acquainted with the southeast quarter of township 24, I should think, since 1865; I recollect the time when Mr. Tefft did some lumbering on that quarter; it was somewhere from 1865 to 1870; he worked there two winters on that quarter.

Q. While he was lumbering there, and while he claimed to own it, did you, in any one year, work out the highway tax for him, and if so, what year?

65 Plaintiff objects, as immaterial and incompetent; ob-tion overruled; plaintiff excepts.

A. Mr. Tefft got me to work out the tax; my recollection is that it was about 1868; I am sure it was after 1865 and before 1870; I worked it out one year.

Cross-examination:

I think it was in 1868; it might have been a year or two from that; the pathmaster was Abner Baker; I don't recollect now what the number of the district is of which he was pathmaster; it was in Harriettstown; the road running from Saranac Lake village to Harriettstown was in his district; there is a large settlement at West Harriettstown, and he was pathmaster of that particular highway at that time; I think the commissioners were Charles Manning, Mr. Noakes and another; I was notified by Mr. Tefft to work out that highway tax; I was not notified by the pathmaster; the pathmaster

directed me where to work it; I worked 100 days in two different districts; I went along from the Essex County line until I got to that other district; the districts were not then numbered; I began at the county line; I worked on the highway going to West Harriettstown from the county line of Franklin county; I began at the school-house near Robert Smith's, southeast of here, and from there to Harriettstown; I worked 100 days; I could not say how many days in each district; Baker was pathmaster of one district, and I cannot tell who was pathmaster of the other; I do not know whether this southeast quarter of township 24 was assessed in two separate districts; I do know it was assessed in the other district; I have seen a record of it; I do not know how many days were assessed in 1868 upon the southeast quarter of township 24; Mr. Tefft told me to go and work out 100 days on the highway; he said that was his tax in Harriettstown; I do not know on what particular lands those other 100 days were assessed, and never did know; I do know
66 that he owned other lands; he did not live on the southeast quarter of township 24; nobody lived on it; I have no knowledge that he had any claim there except from hearsay; I do not know whether any portion of that tax was assessed to him on the southeast quarter of township 24; I do not know whether any portion of the tax that was assessed upon the southeast quarter of township 24 was worked out by me; I understood from Mr. Tefft that he was himself assessed for 100 days in Harriettstown; that it was his personal tax that I was working out; if none of this highway tax in that year was assessed upon the southeast quarter of township 24 to Mr. Tefft personally, I did not work any of that; I knew by his talk as to where this tax that I worked out was assessed; I did not examine any records myself to find out how much tax was assessed to him, and did not examine what particular lands they were assessed to; he told me he had a large tax to work out, and wanted me to go and work it; he told me the number of days to work, and I went and worked that number of days; the pathmaster told me where to work; I forget who the pathmaster in that district was at that time; whether I was pathmaster myself at that time I cannot tell; if I was pathmaster myself in 1868, and made a report of taxes that were not worked, I made it correctly, according to my best information at that time; I am not sure that I was pathmaster at that time or not; I am pretty positive that it was in 1868; it might have varied a year from it; I do not think I was pathmaster at that time; I do not know, however, as I was pathmaster a great many times there; I do not know how much was assessed against this quarter, and never did.

Redirect examination:

Mr. Tefft lived in Plattsburgh.

Q. Did you understand from Mr. Tefft that this highway
67 tax was highway labor assessed on his lands in Harriettstown; what did you understand it was assessed for?

Plaintiff objected, as immaterial and improper.

Objection overruled; plaintiff excepted.

A. He said it was for his lands here in Harriettstown that he was assessed, this highway tax; he did not speak particularly of the southeast quarter of township 24; he said, "I have so much tax to work on my lands in Harriettstown;" he was then here at Cold Brook; it was one of the same winters that I had been at work lumbering for him, on the southeast quarter of township 24; I think it was the first winter that I worked there in the woods; there is another district between our district and that quarter; our district was bounded by the school-house; the work done must have been 10 miles from the southeast quarter of township 24.

Recross-examination:

There was a highway district nearer to this land than the one in which I did work.

ABNER BAKER, called for the defendant, testified as follows:

I am most 54 years old; live in the town of Franklin, Franklin county, and formerly lived in the town of Harriettstown; I came to Harriettstown in 1865 and left in 1883; during the year 1868 I was overseer of highways or pathmaster in that town; I was never pathmaster for that town except for that year.

Q. State whether or not in the year 1868 John Rorke worked out non-resident tax on any of your highways for Otis Tefft.

Plaintiff objects, as immaterial and irrelevant; that no person by the name of Tefft is shown to have any interest in the
68 lands in dispute, and also that the records themselves of the taxes assessed and taxes worked is the best evidence.

Objection overruled; plaintiff excepts.

A. He did work some non-resident tax for Otis Tefft; he commenced at Alder brook, near Thomas Manning's house, and worked north between Alder brook and Two Bridge brook.

Q. Did he also work tax in Mr. Manning's district that year?

Plaintiff objects, same as last above, and also that the tax warrants themselves are the best evidence of what taxes were assessed and should be produced, and on the ground that if he worked in another district and for another pathmaster, and under the direction of another pathmaster, the best proof would be the evidence of the pathmaster under whom he worked, and also that it is hearsay in regard to any taxes worked outside of his own district.

Objection overruled; plaintiff excepts.

A. Yes, sir.

Q. Who was that for?

Same objection as before by plaintiff; same ruling and exception.

A. It was for Tefft; he worked south from Alder brook, down between there and where the school-house was at that time; that district was called district No. 2; he worked over a mile of road in that district, I think, and about a mile in the other district; I calculate he went about two miles on the whole.

Cross-examination:

I only know for whom he worked in district No. 2, or Manning's district, by what he and the commissioner (Mr. Noakes) told me.

Plaintiff moves to strike out the testimony as hearsay.

69 I did not return any unworked taxes in my district that year; there were none to return; Manning is living; I never returned any taxes that had been worked nor any non-resident land that had been worked; I do not know that Mr. Manning ever did; I have not the tax warrant with me; I don't remember what was done with it; I have made no search for it; my district, No. 1, is six or seven miles away from the southeast quarter of township 24; No. 2 is nearer, and there was another district nearer still; Mr. Tefft at that time was not a resident of this part of the country; he resided in Plattsburgh.

Redirect examination:

I have no definite recollection of the location of these several districts; Manning's district did not include 24; his district was in 21; there was another separate district in township 24; Saranac Lake district was the nearest to 24.

Q. Work was done under the commissioners in these different districts for assessments made in other districts, was there not, in the year 1868?

Plaintiff objects as irregular, immaterial, irrelevant and improper, and not the best evidence; too general to draw any presumption from; that it has no relation to what was worked or what was assessed on township 24; that the records of the commissioners are the best evidence as to where they appointed the work to be done.

The court allows the question as regarding a fact.

Plaintiff excepts.

A. There was work done that way; yes, sir.

Q. About how many miles were there in the town of Harriettstown in the year 1868?

Plaintiff objects as immaterial; objection overruled; plaintiff excepts.

A. Some 10 miles in all.

70 Recross-examination:

Q. Did the commissioners direct any work to be done on non-resident lands unless they furnished the money for it?

A. They did; Mr. Tefft paid for that work; I was not present when it was paid; the commissioners did not direct me to do any work in my district for which they did not furnish the money; they did not furnish money to do any work in my district; I did not do any work except what was on my warrant; I had no talk with the commissioners about doing any work except what was on my warrant, and had no directions from them to do any; I had directions

from Mr. Noakes, the commissioner, to oversee this work that Mr. Rorke was to do; there were three commissioners there that year; I had no talk with any of the others; there was a district lying nearer the southeast quarter of township 24 than district No. 2, and within three or four miles of it; I have no knowledge but what the commissioners discharged their duties as to the apportionment of the lands in the various districts as the law requires; my attention has not been called to this matter of the work done by Rorke, done in 1868, from that time until today; I made no memorandum of it; I have not seen Mr. Rorke today.

Redirect examination:

The work was done right along at one time, continuously, by Mr. Rorke; at the time the work was being done I understood it was being done as non-resident tax for Mr. Tefft.

OTIS A. TEFFT, sworn for defendant, testified as follows:

I reside at Sandy Hill, Washington county, and formerly at Plattsburgh; I was engaged in the lumber business on the Saranac river from 1852 to 1879; I was acquainted with the southeast quarter of township 24, McComb's purchase in Harriettstown,
71 Franklin county; the first that I paid any attention to it was in 1864; I owned it from 1864, when I bought it, until I sold to Norton in 1869; I purchased it from Barnard & Son; I did some lumbering on this quarter; the first I believe was in 1864, and from that on with one year's interval—the year I do not exactly recollect—up to 1869.

Q. Did you in any of those years, from 1864 to 1869, inclusive, work out a highway tax upon that land, or cause it to be worked out?

Judge KELLOGG: I object to that, upon the grounds, first, that the apportionment of the commissioner of highways required a record to be made of highway taxes and filed in the town clerk's office, and a distribution in the town and various roadmasters, is a matter which is regulated by the statute; those records should be produced to determine what tax, in what locality, and on what particular land they were levied.

Objection overruled; plaintiff excepts.

A. I caused it to be worked out one year to the best of my recollection, either 1867 or 1868; I do not recollect by whom it was done: I did not give any directions as to where it was to be worked out; I paid this tax at the request of Mr. Noakes, who I believe was at that time commissioner of highways; I could not tell where this tax was worked out; I supposed it was in the town of Harriettstown; I do not know that it was worked out at all; I paid for having it worked out.

Q. State how you came to pay for highway tax upon this land in 1867 or 1868.

Objected to as irrelevant, immaterial and improper, and calling for conversation or his motive in paying, and further that he has

not yet said that he paid any highway tax, and there is no evidence that he paid any highway tax; he paid some money to a man by the name of Noakes.

Objection overruled and exception.

72 A. I did at the request of Mr. Noakes, commissioner of highways in the town of Harristown; I could not be exact as to the amount of this tax; as nearly *as* I can state it was from $75 to $100; I do not recollect to whom I paid it; I could not give the name of the party to whom I paid it; I did not have charge of the work personally; don't know that a man by the name of Rorke worked for me then; one year Mr. Bishop, and two or three years Mr. O'Neil had charge; it seems that we had only a contract from Mr. Barnard on this quarter; my impression is that we had paid it up and taken title; I did have a contract; I have looked for it, but have been unable to find it.

Cross-examination:

I owned some land in the northwest quarter of township 24: I owned the whole quarter, less what was understood to be 1,000 acres formerly belonging to Peter Comstock; that left me 6,000 acres, or perhaps a fraction more; that is in the town of Harriettstown, and I owned it from 1864 to 1869.

Q. The money that you say you paid on the assumption that it was for road-work or road taxes in that town of Harriettstown at the time you speak of, may it have been for taxes in this quarter—the northwest quarter?

A. No; I think not.

Q. Do you know?

A. I do not; I supposed we had a deed to this quarter, but it appears now that we had not; it was sold to Norton; we assigned the contract, and he took title; if the record shows a deed from Barnard to me dated October 19, 1871, and a deed from me to Norton, dated January 17, 1873, I should say that it is correct, but it does not tally with my recollection; I did not see any of the apportionments by the highway commissioners of the road taxes for any of these years; I paid no attention to such matters; I do not know who I paid the money to, and I do not know the exact amount
73 paid; I do not know except from representation that that money was ever used for working road tax; I could not say whether I had any receipt from any pathmaster or highway commissioner for road taxes levied or apportioned to me during any of those years on any of the lands that I owned in the town of Harriettstown; all papers connected with that business have been destroyed; I do not know who was pathmaster during any of those years in any of the road districts where I was assessed; I have no recollection who I paid the money to; it may have been paid here in Plattsburgh, and very likely was; I have no recollection; I paid in money or its equivalent; I am able to say that I paid simply by the recollection that I have; I have no data; my account books covering those years have been destroyed; I have a distinct recol-

lection of paying some money, but at what time or in what amount I cannot say; the purpose I recollect distinctly; it was on lands in Harriettstown; those two portions were all that we had; some time before we owned about one-third of township 23, but not at this time; we had sold that to Rosecrans some years before; we owned it in 1859, but not long after; I do not know that Mr. Norton owned anything in the southeast quarter of township 24 until after our sale to him; I do not think that he did.

Redirect examination:

My books and papers were destroyed by fire about 1876.

Q. Were you requested by any one to work out the highway tax in Harriettstown in the years 1867 and 1868, and if so was it by the commissioner of highways?

Objected to, on the ground that the commissioner of highways had no right under the statute to inform the parties, but to deliver to the pathmaster the apportionment of taxes for each road district, and it is his duty, made so by the statute, to inform the parties assessed to pay.

Overruled and exception.

74 I was requested by Mr. Noakes; I subsequently paid it; Mr. Noakes, I understood, was commissioner of highways, stated on what highway in Harriettstown he wanted this tax worked, on the road leading from Harriettstown, or the settlement at the river toward West Harriettstown, at a place near Priest Smith's, or near that neighborhood.

Recross-examination:

I have conversed on this subject recently with Messrs. Barnard, Beckwith and Turner; they did not tell me what certain witnesses had already sworn to in this case in regard to highway labor; they did not tell me the fact that highway work was done to work out the tax assessed upon some portions of this land that I owned; I claimed to own the whole southeast quarter of township 24 during those years from 1866 to 1869; I think about 7,500 acres; I do not know whether all my lands were in one road district or not; I do not know whether this particular place where I was requested to do work by the highway commission was in the road district in which my lands were assessed; I do not know the amount of the road tax for either of those years on all my lands; I do not know whether they were assessed uniformly by the acre or not; I do not know whether each quarter was assessed as a whole—I think it must have been—because they were not subdivided; I should presume the assessment would be in proportion to the number of acres allowed to that district.

Defendant rests.

FRANK C. PARKER, called on behalf of the plaintiff, testified:

I reside in Keene valley; I have been at what they call the Moody

meadows on the Rogers brook; I was there about two years ago, when a photograph was taken of the meadow; the picture
75 shown me was then taken; another was taken a few days ago; I was there again a few days ago when that other picture was taken; it was last Saturday; there was snow on the ground then; the picture was taken from a point on the division line, between the southeast quarter and the northeast quarter of township 24; it was a few rods from the county line; it was the nearest point that a good view could be got; the picture correctly represents the portion of the meadow which lies in the southeast quarter; the trees in the corner, birch trees, have marks on them; they are blazed on both sides of them; on the east and west sides.

The plaintiff offers photograph in evidence.

Objected to by defendant as immaterial, insufficiently proved and incompetent for any purpose; objection overruled; photograph received; exception to defendant.

Photograph marked "Plaintiff's No. 2."

Either party may use and produce the same upon the argument.

Cross-examination:

I was present when the photograph was taken; I did look through the camera when the photograph was taken; I did not see it developed.

Redirect:

I was with a surveyor once when he ran out the division line; the surveyor was Charles F. Carpenter; commenced to run out the line August 15, two years ago; the division line crossed the brook, I should say, not more than twenty-five rods from the dam; the dam is taken in this picture; I mean you can see the place where it is; the dam is so small you couldn't notice it any way in a picture; this picture does not show all of the meadow which lies in the southeast quarter of township 24; it shows the entire large meadow; there is a little strip of woods below the dam; then
76 there is a little strip of woods below that where the division line crosses; I think there is not more than half an acre below the dam in the southeast corner of the township; we took another picture showing that half acre; picture shown me is the picture; it correctly shows the delineation of the meadow below the dam; it shows the line north of the division line; where those stacks were stacked in the season is where the division line should cross between the north and south quarters; and what lies on the upper side of that is the southeast quarter.

Plaintiff offers photograph in evidence.

Objected to by defendant as immaterial, insufficiently proved, and incompetent for any purpose.

Photograph received, marked "Plaintiff's No. 3."

Either party may use and produce the same upon the argument.

Exception to defendant.

I did not examine the extent of the meadows nor make any estimate of the acreage; I made some measurements; the total acreage of the meadows lying in the southeast quarter is a trifle over five acres; I include in that measurement everything that had been cut over at any time; I cannot tell how many acres north of the division line in the northeast quarter; I did not measure that; south of the division line there is this little strip of half an acre, and then beyond that about five acres; as I understand it the division line runs between the southeast and northeast quarter; there was a large meadow in the northeast quarter, and they were connected with the meadows here that have been mowed over; I should say about two-thirds of all the meadows lies south of the division line; all the mowing was to the south; I don't know positively about it; I was there in August; the character of the grass on these meadows was wild hay that you find generally on these wild meadows and marshes; I am familiar with the growth of wild grass in this region on intervale lands; it does not differ at all from this; I did not
77 see any evidence of any brush being cut; only some hemlock cut off for lumbering purposes outside the meadow; I saw no evidence at all of any cultivation; when we were there Mr. Moody was there cutting on the northeast quarter, not more than a few rods from the line; I examined the dam that was there; it was not much of anything; it was logs thrown across between two large rocks; a few stone rafts thrown down; nothing more than what a man could make in half a day very easily; there were two rocks, one on each side; the water ran between these two; on the upper side of these rocks the logs were placed, and the dam was not more than three feet high; the dam was at the top of the falls; I measured off fifty feet tape-measure; first I struck in on the shore on the edge of the brook; then we measured south through the dam; we made it about one hundred and twelve rods; the average width was eight rods, covering both sides of the brook; the soil is a kind of swampy bog soil; what is generally found in such places; it is cold, wet soil; I did not see that the brook had overflown much; the ground did not appear to be springy; the turf was pretty thick.

Cross-examination:

I was requested to go to this place and make a survey by the warden, Mr. Garmon; I am one of his subemployees under the State forestry; have been so nearly three years; Albert Turner is in same employ; he was not with us when these pictures were taken, or when this survey was made; I went there for the commission; Garmon told me to do it, and I did; I used my own judgment somewhat; I knew what he wanted. I practiced surveying before I went into the employ of Garmon on a small scale; I do not pretend to be a surveyor; I am assistant sometimes in doing such things; before I went there by direction of Garmon I had been there to find the lines of the township—the outside lines; that was two years ago; a year ago last August was the time that I ran through
78 the lines the first time; Mr. Carpenter, our surveyor, told me where the corner was and where the line was; I did not

know when the township was originally surveyed or subdivided into quarters, nor who surveyed it originally; never saw the original field-notes; I had never been to the corner before; I came to go to that corner when I was assisting a surveyor; I do not know whether I was on the true division line or not, of my own knowledge, between the north and south half; I did not conclude anything about it; I was with my superior and went according to my instructions; went through with him; I do not know whether he was present at the time of the original survey; I do not know whether he had the original field-notes; from where the established corner is supposed to be, I can say what portion of this meadow lies on the north and what on the south side of the division line of the north and south half; I believe Mr. Colvin established the corner; Mr. Carpenter is dead; I saw Mr. Moody there cutting grass on these meadows on the northeast quarter; the hay on the southeast quarter had not been cut when I was there; I never had any experience cutting brush in such places.

Redirect:

We found a spruce tree marked on three sides, and witness marks around it on this corner; that is the county line; besides, we found a rock which was marked with figures, and one thing and another for witness; the rock was marked by an arrow and drill-hole pointing north and toward the corner; going west across the brook we found a few marked trees right on the edge of the brook; one was a balsam; after that we came to a burned knoll and we struck through a marsh—Miller Pond marsh; then we ran as far as we could and put up a flag and went round it; at the other end we found the line again and retraced it to the edge of the marsh, where we found a blazed tree marked on a tamarack which was on the line which we ran; it continued the line right through; we ran north of the county line; we followed the line trees a little way,
79 and the rest was where the brush was cut; this tree here on the photograph is on the county line; the tree is at the head of the meadow; the meadow that this picture represents is on the side of the line; the spot shown on the photograph is the Essex County line; those spots were on the stakes that we set and in the line that we run; we run by the spot on the trees shown in the photograph; the picture correctly represents the situation at the head of Exhibit No. 4, the meadow.

M. V. B. Miller, called by the plaintiff:

I reside at Saranac Lake village, and have since 1859; I am acquainted with the southeast quarter of township 24, to some extent; I have been over what is known as the Rogers Brook meadow or intervales; I lumbered it over once before there was any meadow there; I had some shanties on that quarter right near where those meadows are in the winter of 1859; I lumbered this in 1859, 1860 and 1861; at that time there were no meadows there on that quarter; there was some wild grass there, but nobody ever cut it; I don't know anything about Mr. Moody doing anything there in 1859,

1860 or 1861; he didn't do any cultivating there above the falls; some of the Moodys had cut hay below; they had some stacks there; those stacks at that time were on the north of what is known as the division line, on the northeast quarter; the fields claimed to be meadows now were at that time low ground, and principally covered with tamarack—I cannot say whether dead or alive; I do not know how large a meadow might be made there north of the division line; there might be a meadow of twenty-five acres made south of the division line; I should have to guess at the number of acres north of the line; I do not think it would exceed four; I don't remember going there again until the spring of 1882; I then went on a survey with Mr. Colvin's party, and that is the first I knew of those meadows; there have been meadows there a good many years; I did not go on the division line at that time;
80 in 1882 there was some good meadows there; it might be four or five acres of meadows; I did not measure them; it was before they cut the hay; it was in June; I did not see any evidence of cultivation, only it showed that it had been mowed over some time or other; I did notice particularly as to the character of the grass; I know that in the vicinity of where the shanties were there was considerable of tame grass; I should think perhaps clover and timothy; I could not say how they came there; on the high ground the grass was of the character of wild grass; my impression is that it was better than the average quality of wild meadow hay; I have been over the division line since 1882; I went and put Mr. Carpenter on what we call the corner and went through the centre of the township; I knew where the corner was, because I had lumbered on it; I do not remember about the rock; the line crosses below the dam, probably twenty-five or thirty rods; in the upper portion of the meadow there were several clumps of alders in 1882; I am not sure that they had the appearance that they have in this picture; there was something in the brook to stop the water; some rafts across; at the time I — there it didn't stop the water; if they had been made tight it would have caused quite a little flow; I own a farm, and have a farm to take care of; I have seen redtop; there is no great room to make a mistake between redtop and June grass; June grass invariably grows on dry, light soil and ripens in June; redtop always grows on wet land; I do not think I ever saw any redtop grow unless something brought it there, in the way of cattle or of sowing or something of that kind; my experience is that if water stands on it for any length of time the redtop will get killed and wild grass come on; my shanties were built on the southeast quarter; I fed ordinary upland hay to my stock while there; I was there three winters, and manure was left on the ground; herdsgrass and clover sometimes take a little from feeding in that way.

81 Cross-examination:

The meadows were known at that early day and called the Moody meadows; I have known of their drawing mown hay in that direc-

tion; I was going through there once, and met Harvey Moody with a load of hay and got onto the load; he had drawn the load off those meadows; I got the impression that he had quite a crop of hay, several tons altogether; I know the meadow up above had been extended at the time I was there with Colvin's party; Colvin did not pretend to run the division line; he had all the field-notes and I have got them now; the shanties were built right near the division line; and then we had a horse barn accommodating eight or ten teams extending north to the line; the line, as I recollect it, went within one rod of the horse barn; the shanties were burned in 1862; those shanties were ninety feet long perhaps; there was a general fire all through them in 1862, and whether it originated by somebody in the camp or some other way I do not know; the ride I had with Mr. Moody was probably five or ten years before he died; I was agent under the comptroller for a while.

Q. After the sale of 1881, and in the year 1881, did you report to the comptroller of the State of New York that the southeast quarter of township 24 was occupied, and were you at that time in the employ of the comptroller to look after State lands and their occupancy in this region?

Objected to as immaterial, irrelevant, and incompetent, and improper; objection sustained; exception to defendant.

(Witness shown copy of assessment-roll of the town of Harriettstown of 1870, and purporting to have the warrant of the supervisors thereto.) Witness says, he was supervisor of that town for that year; says he knows the signatures of the supervisors of that year; seen them sign in that way and became acquainted with their signatures.

82 Defendant offers to show that the signatures to the warrant attached to the assessment-roll are the genuine signatures of the supervisors of the town of Harrietsttown for the year 1870.

Objected to by the plaintiff as improper and irrelevant; that the roll presented to the witness purports to be only a copy, and that no signature is necessary to be attached to it; that the warrant is no part of a copy of any assessment-roll; objection sustained; exception to defendant.

Redirect examination:

In the roll of 1870 in evidence there is no signature to the assessment-roll of the assessors or of any magistrate.

Plaintiff rests.

The testimony was here closed.

The plaintiff at the close of the trial moved to strike out the assessment-rolls of the town of Harriettstown, Exhibits C, D, E, and F, as immaterial and irrelevant, under chapter 448 of the Laws of 1885. Defendant opposed the motion on the ground that said act was unconstitutional and void, and in violation of section one of article fourteen of the amendments to the Constitution of the United States.

Motion granted and rolls stricken out; exception to defendant.

The foregoing case contains all the evidence offered on the trial of the action.

The defendant at the time the cause was submitted to the referee requested the referee to make the following findings of fact and conclusions of law, which requests were disposed of by the referee at the time he made his report in the manner expressed under each of said requests respectively:

83 *Facts.*

First. The southeast quarter of township 24, great lot one, Macomb's purchase, situated in the town of Harriettstown, Franklin county, New York, being the premises mentioned in the complaint herein, was sold for unpaid taxes in the year 1859 by the comptroller of the State of New York to Samuel W. Barnard, and conveyed to him by the said comptroller in pursuance of such sale by deed dated December 27, 1864.

I so find. RICHARD L. HAND, *Referee.*

Second. At the time of the sale mentioned in the preceding request said Samuel W. Barnard, together with one F. J. Barnard had, or claimed to have, title to the said lands or to an undivided interest therein; which interest, together with the estate and interest in said land acquired by said Samuel W Barnard under the comptroller's deed mentioned in the preceding request, was conveyed to Christopher F. Norton by said Samuel W. and F. J. Barnard by deed dated November 25, 1872, and recorded in Franklin county clerk's office in Book 51 of Deeds, page 486, on the 22d day of January, 1873.

I so find. RICHARD L. HAND, *Referee.*

Third. The said lands mentioned in the first request were again sold for unpaid taxes in the year 1866 by the comptroller of the State of New York, and thereafter and in pursuance of the said sale were conveyed by the said comptroller to the said Christopher F. Norton by deed dated January 22, 1873, and recorded in Franklin county clerk's office in Book 57 of Deeds, page 577, on the 25th day of February, 1873.

I so find. RICHARD L. HAND, *Referee.*

Fourth. The land in question is in general wild and uncultivated forest land, but in the northeast part thereof there is, and at all times since about 1860 there has been, a parcel containing about
84 ten acres lying on each side of "Rogers brook," so called, and extending into the northeast quarter of said township, but at least five acres thereof being in the said southeast quarter, which is, and since about 1860 has been, substantially cleared, upon which grass capable of being made into hay, naturally and annu-

ally grows, and which is, and since about 1860 has been known as the "Moody" meadow.

Refused, except as found in my report.
RICHARD L. HAND, *Referee.*

Fifth. Harvey Moody in the summer of each year from about 1860 down to his death in 1880 cut, or caused to be cut, the grass growing on the said meadow, made it into hay and stored it in stacks upon the said meadow until the following winter when he drew or caused it to be drawn to his home about six miles distant, where he used it for the purpose of feeding cattle as hay is ordinarily used, or sold it to others for such use. The quantity of hay so cut and made upon the land in question by said Harvey Moody varied, amounting in some years to from eight to twelve tons.

Refused, except as found in my report.
RICHARD L. HAND, *Referee.*

Sixth. Harvey Moody upon different occasions between 1860 and 1880 caused grass seed to be sown upon the said meadow.

Refused, except as found in my report.
RICHARD L. HAND, *Referee.*

Seventh. Harvey Moody upon different occasions between 1860 and 1880 caused the said meadow to be burned over, the object being to remove the stubble and brush and to fertilize the ground and so increase the quantity of hay to be obtained therefrom.

Refused, except as found in my report.
RICHARD L. HAND, *Referee.*

85 Eighth. Harvey Moody upon different occasions between 1860 and 1880 cut, or caused to be cut, and removed alders and other brush growing in or around the said meadow, thereby increasing the area of grass-growing land, and some years previous to his death erected and afterward maintained a dam across the Rogers brook upon the said meadow, for the purpose of flooding the said meadow.

Refused, except as found in my report.
RICHARD L. HAND, *Referee.*

Ninth. At some time between the year 1870 and 1876, and when Christopher F. Norton owned or claimed to own the said southeast quarter of township No. 24, an agreement was made between said Norton and Harvey Moody whereby said Norton in consideration of work and labor to be performed by said Moody in guarding from trespassers the lands owned or claimed by said Norton, granted to said Moody the right to use the meadow land described in the fourth of these requests and agreed to give him a written lease of the same.

Refused, except as found in my report.
RICHARD L. HAND, *Referee.*

Tenth. It was the intention of Harvey Moody in making the agreement with Christopher F. Norton mentioned in the last preceding request, to secure to himself the beneficial enjoyment of the parcel of land called the "Moody meadow," so far at least as such enjoyment consisted in the appropriation of the ordinary and annual product of said land in its natural condition; and the said Moody then claimed to said Norton that such beneficial enjoyment ought to be granted to him rather than to a stranger for the reason that he had performed work and labor upon the said meadow in cutting brush and otherwise bringing it to its then condition.

Refused, except as found in my report.

RICHARD L. HAND, *Referee.*

86 Eleventh. The acts of Harvey Moody in cutting and making hay upon the so-called "Moody meadow," as stated in the fifth of these requests to find, were open and visible, and the same were generally known throughout the vicinity in which he lived.

Refused, except as found in my report.

RICHARD L. HAND, *Referee.*

Twelfth. No person except said Harvey Moody cut grass or took hay from the said meadow from the year 1862 down to the death of said Moody in 1880.

I so find. RICHARD L. HAND, *Referee.*

Thirteenth. Hay grown and made upon natural meadows in the same manner in which hay was made upon the land in question by Harvey Moody was valuable and was an article of merchandise in that region during the years from 1860 to 1880, and on different occasions hay made by said Moody from the lands in question was sold by him.

Refused, except as found in my report.

RICHARD L. HAND, *Referee.*

Fourteenth. In the summer of 1879 Harvey Moody cut or caused to be cut the grass upon the said meadow and made the same into hay and stored the same in stacks upon the said land. The quantity of hay so made was about twelve (12) tons. It remained upon the land where made until January or February, 1880, when said Harvey Moody caused it to be drawn to his home.

I so find. RICHARD L. HAND, *Referee.*

Fifteenth. The use made by Harvey Moody of that parcel of land know as the "Moody meadow," as such use is stated in the 5th, 6th, 7th, 8th, 13th and 14th of the foregoing requests, was in accordance with the common practice then prevailing in that section of country as regards the use and occupation of lands similar in nature,
87 character, situation and environment to the said meadow.

Refused. RICHARD L. HAND, *Referee.*

Sixteenth. On or about April 15, 1880, Harvey Moody executed and delivered to his daughter Polly Philbrook and his son Fayette Moody a deed purporting to convey that parcel of land forming part of the southeast quarter of said township 24 referred to in the fourth request as the "Moody meadow."

I so find. RICHARD L. HAND, *Referee.*

Seventeenth. Harvey Moody, on October 12, 1879, had possession of the southeast quarter of township 24, great lot one, Macomb's purchase, or some part thereof.

Refused. RICHARD L. HAND, *Referee.*

Eighteenth. On the 12th day of October, 1879, the southeast quarter of township 24, great lot one, Macomb's purchase, or some part thereof, was actually occupied by Harvey Moody.

Refused. RICHARD L. HAND, *Referee.*

Nineteenth. From April 15, 1880, that being the date of the conveyance mentioned in the sixteenth request, down to at least the 23d day of November, 1883, that parcel of land known as the "Moody meadow," and being part of the lands in question, was actually occupied by Polly Philbrook and Fayette Moody, under color of title.

Refused. RICHARD L. HAND, *Referee.*

Twentieth. On the 12th day of October, in the year 1877, the southeast quarter of township twenty-four (24), great lot one (1), Macomb's purchase, was sold by the comptroller of the State of New York for unpaid taxes.

The taxes for which the said sale was made were the county
88 and highway taxes for each of thesyears 1866, 1867, 1868, 1869 and 1870, and the school taxes for 1869.

At the said sale, the said land was bid — by the said comptroller on behalf of the people of this State, and thereafter was conveyed to the said comptroller to the people of this State by deed, dated June 9, 1881, which deed was recorded in the office of the clerk of Franklin county on June 8, 1882.

The two years allowed by law within which the said land might be redeemed from the said sale, expired on October 12, 1879.

I so find. RICHARD L. HAND, *Referee.*

Twenty-first. The title, if any, acquired by the plaintiff herein to the lands in question, under and by virtue of the comptroller's deed, mentioned in the last preceding request, is the only title to said lands shown or claimed by the plaintiff on the trial of this action.

I so find. RICHARD L. HAND, *Referee.*

Twenty-second. No proof has been made in this action that the plaintiff, as purchaser at the tax sale of 1877 or otherwise, ever

served or caused to be served upon the person or persons occupying the lands in question or any part thereof, during the two years allowed by law to redeem from the said sale the notice required by section 68, chapter 427 of the Laws of 1855.

Found as in report, finding VIII; otherwise refused.

RICHARD L. HAND, *Referee.*

Twenty-third. The assessors in and for the town of Harriettstown Franklin county, N. Y., who acted as such in preparing the assessment-roll for the year 1867 were Augustus Torrence and J. J. Miller; the said assessors prepared the assessment-roll of the said town for said year, and the oath required by law as to the correctness of said roll was made and subscribed by them on the 10th day of
89 August, 1867, and the said oath was never thereafter again made by the said assessors.

Refused; plaintiff's deed is conclusive evidence to the contrary.

RICHARD L. HAND, *Referee.*

Twenty-fourth. The assessment-roll of the town of Harriettstown for 1867 prepared and verified in the manner stated in the last preceding request contained upon it the southeast quarter of township 24, great lot one of Macomb's purchase, and was the assessment-roll upon which the supervisors of Franklin county at their annual meeting in 1867 acted in levying the tax upon the said land for the year 1867, which tax was included among those for default in payment of which the said lands were sold by the comptroller on October 12, 1877, as stated in the twentieth of these requests to find.

Refused; same as twenty-third.

RICHARD L. HAND, *Referee.*

Twenty-fifth. In the year 1870 the assessors of the town of Harriettsown after having prepared their assessment-roll for that year, did not nor did any two of them meet on the third Tuesday of August or on any day thereafter for the purpose of reviewing their assessments for that year, and it was upon the assessment-roll so prepared by said assessors and not reviewed by them that the supervisors of Franklin county acted in levying the tax upon the land in question in the year 1870 for default in payment of which the said land was sold by the comptroller on October 12, 1877, as stated in the twentieth of these requests to find.

I refuse to so find, plaintiff's deed is conclusive evidence to the contrary. RICHARD L. HAND, *Referee.*

Twenty-sixth. Christopher F. Norton died intestate in or about 1882, leaving a widow and eight children him surviving, his only heirs-at-law.

On December 16, 1886, six of the children and heirs-at-law of said Christopher F. Norton conveyed all their estate, right, title
90 and interest in and to the southeast quarter of township 24, great lot one, Macomb's purchase, to John B. Riley and on

December 27, 1886, said John B. Riley conveyed all his estate, right, title and interest in and to said land to the defendant herein.

I so find. RICHARD L. HAND, *Referee.*

Twenty-seventh. On June 20, 1877, a judgment was rendered against Christopher F. Norton by the supreme court in an action then pending therein wherein John D. Spicer and John E. Spicer were plaintiffs, and said Norton was defendant, for $59,178.28, and the roll thereof then duly filed and the said judgment docketed in the office of the clerk of Rensselaer county. A transcript of said judgment was duly docketed in the office of the clerk of the county of Franklin on June 21, 1877. After the death of said Christopher F. Norton such proceedings were had, that in April, 1887, an order was duly made by the supreme court, and also a decree by the surrogate's court of Clinton county, that being the surrogate's court having jurisdiction in the premises, granting to William E. Smith as the assignee of the said judgment, leave to issue execution thereon to be enforced against any lands upon which said judgment was a lien in the same manner as if said Norton were not dead. In pursuance of said order and decree and on April 28, 1887, execution was duly issued upon said judgment to the sheriff of Franklin county, under which execution the said sheriff on June 18, 1887, sold to the defendant herein for the sum of six thousand dollars all the estate, right, title and interest which Christopher F. Norton had in and to the southeast quarter of township 24, great lot one, Macomb's purchase, on the 21st day of June, 1877, or which he thereafter acquired, and on the 19th day of February, 1889, said sheriff duly executed and delivered to the defendant a deed of conveyance of the lands so sold to him.

I so find. RICHARD L. HAND, *Referee.*

91 Twenty-eighth. This action was begun March 28, 1887.

Refused. RICHARD L. HAND, *Referee.*

Twenty-ninth. At the time this action was begun defendant was in the actual possession of the lands in question claiming to own the same as his property.

Refused. RICHARD L. HAND, *Referee.*

Thirtieth. Neither the people of the State of New York, nor any officer of said State on their behalf, ever took actual possession of the lands in question under or subsequent to the conveyance to them, made by the comptroller June 9, 1881, in pursuance of the sale of 1877; nor was the said people or any officer of the State in the actual possession of said lands when this action was brought.

I so find. RICHARD L. HAND, *Referee.*

Thirty-first. If the referee shall refuse the thirtieth request, then: No proof has been offered showing, or tending to show, that the people of the State of New York, or any officer of the State on their

behalf, ever took actual possession of the lands in question under or subsequent to the comptroller's deed to them of June 9, 1881.

I so find. RICHARD L. HAND, *Referee.*

Law.

First. That Christopher F. Norton was the owner in fee-simple of the southeast quarter of township 24, great lot one, Macomb's purchase, at the time the same was sold for taxes by the comptroller in 1877, as stated in the 20th proposed finding of fact, and had actual or constructive possession of the same.

I so find. RICHARD L. HAND, *Referee.*

92 Second. That Harvey Moody under and by virtue of his agreement with Norton, mentioned and set forth in the 9th proposed finding of fact, and his acts thereunder, acquired an interest in that parcel of land called the Moody meadow which amounted to an estate in the land.

Refused. RICHARD L. HAND, *Referee.*

Third. That Harvey Moody by the various acts of ownership done by him upon and with reference to that parcel of land called the "Moody meadow," as specified and set forth in the 5th, 6th, 7th, 8th, 9th, 12th, 13th, 14th and 16th proposed findings of fact, acquired and took actual possession of the said parcel of land.

Refused. RICHARD L. HAND, *Referee.*

Fourth. That on October 12, 1879, that being the time when the two years allowed by law for the redemption of lands sold by the comptroiler for unpaid taxes in 1877 expired, the southeast quarter of township 24, great lot one, Macomb's purchase, or some part thereof, was in the actual occupancy of Harvey Moody.

Refused. RICHARD L. HAND, *Referee.*

Fifth. No title whatever to the lands in question vested in the people of the State of New York under or by virtue of the sale to them made by the comptroller October 12, 1877, or the subsequent deed to them executed by the comptroller in pursuance of said sale, unless the said people caused a written notice, in the form and containing the statements required by section 68 of chapter 427 of Laws of 1855, to be served upon the person or persons occupying the said lands or some part thereof as stated in the 18th and 19th requested findings of fact, within two years from the 12th day of October, 1879.

Refused. RICHARD L. HAND, *Referee.*

93 Sixth. It is incumbent on the plaintiffs in order to establish title in themselves to the lands in question under the tax sale of 1877, to prove affirmatively that they have served

the notice specified in the last preceding request upon the person or persons occupying the lands in question or any part thereof.

Refused, because not occupied. RICHARD L. HAND, *Referee.*

Seventh. Plaintiffs, by reason of their failure to prove service of notice on the occupant of the lands in question, have for that reason failed to show any title in themselves to the said lands.

Refused. RICHARD L. HAND, *Referee.*

Eighth. The taxes levied and imposed upon the lands in question by the supervisors of Franklin county in the year 1867, being based, as stated in the 23d and 24th requested findings of fact, upon an assessment-roll verified by the assessors of the town in which said lands were situated before the third Tuesday in August, in the year for which they were assessed, were for that reason illegal and void.

Refused. RICHARD L. HAND, *Referee.*

Ninth. The taxes levied and imposed by the supervisors of Franklin county upon the lands in question in the year 1867, being based, as stated in the 23d and 24th requested findings of fact, upon an assessment-roll verified by the assessors of the town in which they were situated, before the third Tuesday of August in the year for which they were assessed, were for that reason illegal and void under the laws of this State, as they existed and were interpreted, construed and applied by the courts of this State, both at the time the said taxes were levied and at the time the land in question was sold by the comptroller in 1877 for their non-payment.

I decline to so find. RICHARD L. HAND, *Referee.*

Tenth. The taxes levied and imposed upon the lands in
94 question by the supervisors of Franklin county in the year 1870 were illegal and void by reason of the omission of the assessors to meet to review their assessments, as stated in the 25th proposed finding of fact.

Refused. RICHARD L. HAND, *Referee.*

Eleventh. The taxes levied and imposed upon the lands in question by the supervisors of Franklin county in the year 1870, by reason of the omission of the assessors to meet to review their assessment-roll, as stated in the 25th proposed finding of fact, were illegal and void under the laws of this State, as such laws existed and were interpreted, construed and applied by the courts of this State, both at the time said taxes were levied and at the time the land in question was sold by the comptroller in 1877 for their non-payment.

I refuse to so find. RICHARD L. HAND, *Referee.*

Twelfth. The sale of the lands in question made by the comptroller to the plaintiff October 12, 1877, was and is illegal and void, and the conveyance of the said land executed by the comptroller to

the plaintiff in pursuance of said sale, was and is ineffectual to divest the owner of said lands of his title.

Refused. RICHARD L. HAND, *Referee.*

Thirteenth. The sale of the lands in question made to the plaintiff by the comptroller, October 12, 1877, was illegal and void under the laws of the State of New York as they existed and were interpreted, construed and applied by the courts of this State at the time of said sale; and the conveyance of said lands executed to the plaintiff by the said comptroller in pursuance of said sale was, under the laws of this State as they then were, invalid and ineffectual to divest the owner of said lands of his title.

I refuse to so find. RICHARD L. HAND, *Referee.*

95 Fourteenth. Chapter 448, of the Laws of 1885, so far as the same attempts, or undertakes, or purports, to render valid and effectual any past sale of lands for unpaid taxes, which sale, at the time it was made, was for any reason illegal and void, is invalid for the reason that the same is repugnant to the Constitution of the United States, and particularly to the first section of the fourteenth article of the amendments thereof.

Refused. RICHARD L. HAND, *Referee.*

Fifteenth. During the six months immediately following the 9th day of June, 1885, that being the day on which chapter 448 of the Laws of 1885 was passed, there was no law or statute of the State of New York in force whereby the people of said State had subjected themselves to any action at law or suit in equity or to any other legal proceeding in a court of justice for the purpose of vacating any sale of lands to the said people for unpaid taxes, or any conveyance or certificate of sale made to the said people in pursuance of such tax sale.

Refused. RICHARD L. HAND, *Referee.*

Sixteenth. The power and authority conferred by the laws of the State of New York upon the comptroller of said State to cancel sales of land for unpaid taxes whenever such sale shall, for any cause, be invalid, as such power and authority existed during the six months following the 9th day of June, 1885, according to the interpretation and construction given to the laws of said State conferring such power, by the highest court in said State, cannot be invoked by the person whose land was sold for taxes, nor can the said comptroller be compelled, upon the application of such person to cancel an invalid tax sale.

Refused. RICHARD L. HAND, *Referee.*

Seventeenth. Chapter 448 of the Laws of 1885, considered as a statute of limitation and with reference to sales of land for
96 unpaid taxes made prior to its passage to the people of the State of New York, which sales were for any reason illegal

and void when they were made, is invalid and repugnant to the Constitution of the United States and particularly to the first section of the fourteenth article of the amendments thereof.

Refused. RICHARD L. HAND, *Referee.*

The foregoing case is hereby settled and allowed, and I hereby certify that the same contains all the evidence given upon the trial of this action, and the clerk of Franklin county is hereby ordered to file the same in his office and attach it to the judgment-roll.

Dated, April —, 1894.

RICHARD L. HAND, *Referee.*

It is hereby stipulated that the foregoing are correct and true copies of the judgment-roll, exceptions, notice of appeal, and case constituting the entire record in this action, all of which are on file in the office of the clerk of Franklin county, and certification of the same by the said clerk is hereby waived.

Dated, April —, 1894.

ALBERT HESSBERG,
Attorney for Plaintiff.
FRANK E. SMITH,
Attorney for Defendant.

97 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* BENTON TURNER. } Opinion.

HAND, *Referee:*

The objections that the assessment-roll for 1867 was not verified after the tenth day of August, and that the assessors did not meet in 1870 for review of their assessment, are obviated by chapter 448 of the Laws of 1885. Indeed, the effect of this enactment being to make the conveyance, under which the plaintiff claims conclusive evidence, under the circumstances of this trial, of regularity in these respects, it cannot be found that such objections have any basis of fact. Nor is this statute unconstitutional in that regard.

People *vs.* Turner, 49 Hun, 466.
S. C. in Ct. of Appeals, 117 N. Y., 227.
Joslyn *vs.* Rockwell, 13 N. Y. Suppl., 311.
Cromwell *vs.* McLean, 123 N. Y., 474.

It is urged with great force that the decisions by which the constitutionality of this enactment was maintained were in cases where the objection of want of opportunity, because the State, who claims under the comptroller's deed here, has not expressed its consent to be sued, was not presented to or considered by the courts. But the same state of facts in this respect existed in People *vs.* Turner (117 N. Y., *supra*), and no impression produced upon the mind of the referee by the learning and ability of the learned counsel for the

defendant could properly result in a decision that a statute is unconstitutional, which the courts of this State have upon facts substantially the same declared constitutional, upon the theory
98 that those courts have overlooked the existence or effect of those facts. Such an argument, if correct, cannot prevail until presented in the court of appeals.

If the premises described in the comptroller's deed to the plaintiff and under which the plaintiff claims in this action, "or any part thereof" were, on the 12th day of October, 1879, "in the actual occupancy of any person," the plaintiff has failed to establish title; has not shown a right to the immediate possession of the logs cut by the defendant, and cannot, therefore, recover in this action.

No claim was made that there was any occupation otherwise than by the acts of Harvey Moody; and the question presented is, whether those were an actual occupation of any part of the premises at the time specified.

It must be conceded, we think, that this question should be considered and determined precisely as if the only property described in the comptroller's deed to the plaintiff were the strip of land along Rogers brook, spoken of as "Moody's meadows."

Comstock *vs.* Beardsley, 15 Wend., 348.
Bush *vs.* Davidson, 16 Wend., 550.
Leland *vs.* Bennett, 5 Hill, 286.

The authorities were also to the effect that the occupation within the meaning of this statute (Laws of 1855, ch. 427, sec. 68) need not be under claim of title.

Jackson *vs.* Estey, 7 Wend., 148.
Lucas *vs.* McEnerna, 19 Hun, 14.
Bank *vs.* Merscereau, 3 Barb., ch. 528.

The facts may be stated briefly as follows:

In the midst of a forest, three miles from any highway or human habitation, was a piece of low marshy land, too soft to bear upon its furface the weight of domestic animals, excepting when frozen in the winter season, through which ran a small stream, called "Rogers brook." The melting snows covered this strip of land with water in the spring time, and a scant natural growth of trees grew and died and fell upon it. "Wild grass" occupied much of
99 its surface and frequent "clumps" of alder and other bushes were scattered over it. Its condition seems to have been attributed to the work of a colony of beavers, at some previous time, as it is characterized as a "beaver meadow." Such a place, resulting from purely natural causes, would furnish a kind of coarse hay, available for feeding cattle but unsuited to horses. It is not proved, but may, we think, be inferred from the testimony of Torrance, Ames and Miller, that such natural meadows are not uncommon among Adirondack forests and that the people of that country resort to them, more or less, for the grass which may be obtained from them.

The land in question lay in the southeast and northeast quarters

of township 24 (the southeast quarter being the premises described in the complaint) and extended across the township line into the adjoining county of Essex; four or five acres of it lying in each quarter, and about one acre beyond the county line.

About the year 1860, Harvey Moody, residing some six miles distant and having no right to or interest in the premises, entered upon this natural meadow and cut some grass, but seems to have done nothing upon that portion of it lying in the southeast quarter of the township earlier than 1862 (Miller). About the year 1862, or soon after, he extended this cutting into the southeast quarter and over into Essex county. From that time and until his death, in April, 1880, he annually, in August or September, cut this grass; and as it could not be drawn away until the ground was frozen, stacked it on the ground when cut. Each succeeding winter, in January or February, it was drawn off by himself and those to whom he at times sold some of it. The amount of hay thus procured from the entire surface cut over varied, the largest amount being from eight to twelve tons.

On two occasions Moody scattered a little grass seed on the surface, once a peck of "herdsgrass," and on the other occasion a peck of "redtop," and he twice burned over the dry brush and stubble. From time to time he cut away more or less of the bushes, by which the area of the grass was somewhat enlarged. Such cutting on the one hand, and the natural increase of bushes on the other, made the extent of surface which could be mown quite variable, but it seems to have never exceeded ten acres.

He used a small "dam," made by throwing some poles across the brook and placing slabs or pieces of board on them, to obstruct the stream and thus overflow a little land—perhaps half an acre.

The quality of grass improved somewhat and was slightly superior to that cut upon similar natural meadows in that portion of the country.

No other person, so far as appears, ever cut grass upon this ground, and it came to be known as the "Moody meadows."

Between 1870 and 1876, Mr. Norton, who was the owner of the southeast quarter of township 24, and other forest lands in the neighborhood, visited his property. Moody had an interview with him at that time, and an agreement was made between them by which, in consideration of Moody's undertaking to keep watch for trespassers on Norton's property, the latter gave Moody the privilege of cutting grass upon these "Moody meadows." There was some talk about a lease of them and such a paper was subsequently written, but it does not appear to have been delivered to Moody, or indeed executed by Norton. No dwelling-house or other building was ever placed or used upon the land by Moody. No fence inclosed any part of it at any time. No ground was broken anywhere upon its surface. Nor is it shown that its use had any connection with any known farm, or was for supply of fuel or fencing timber.

These being the facts, was Moody "in the actual occupancy" of the premises in October, 1879?

It is not necessary to the possession of land, we think, that it be inclosed by fence, or that any one should in fact reside upon it; but we are aware of no adjudication by the courts of this State which recognized as an "actual occupant," under this statute, one who does not either reside upon or cultivate uninclosed premises. In
101 Comstock *vs.* Beardsley, there was a resident in a dwelling-house and cultivation also; in Bush *vs.* Davison, a tenant reside- upon the land; in Leland *vs.* Bennett, there was an actual cultivation, and the decision of Smith *vs.* Sanger, in the supreme court (3 Barb., 360), was based upon cultivation and the fact that a fence inclosed the premises.

It is urged, however, that here is shown cultivation, because Moody scattered some grass seed on the surface, twice, set fire to the dry materials on the surface, twice, on different occasions obstructed the brook in such a way as to put half an acre of the land temporarily under water, and cut away some of the alders nearly every year.

We cannot regard all these acts as constituting in any proper sense cultivation. These, it seems to us, are but incidents, and very slight ones, in the getting from wild, uninclosed and unimproved land its natural product. While the photographs in evidence, and, more especially, the description given by all the witnesses render the claim that this "beaver meadow" was cultivated or improved entirely indefensible.

But if this could be regarded as a cultivation of the meadow, an insuperable difficulty is found, we think, in the relations of Moody to the property. It would seem an embarrassing rule, by which the intent of a third person in doing acts upon the land should be of weight in determining where the title to that land is vested. Yet there can be no question that such intent may be of the utmost importance. Suppose a piece of property has been sold for taxes, upon which there is an abandoned dwelling-house, the premises being wholly unoccupied. When the time for giving notice to occupants has arrived, should the purchaser find in this dwelling-house a tramp, who has availed himself of its shelter for an hour's midday slumber, must his title fail for want of notice to redeem given to this tramp? On the other hand, if this same tramp, with the intention to adopt this house as his dwelling and hold it
102 as such, right or wrong, so long as he can, has entered into possession of it, can it be said that there is no "actual occupant" of it?

We think that the court of appeals has directly decided that intent may be a vital element of "actual occupancy."

Smith *vs.* Sanger, 4 N. Y., 577.

There was what the supreme court regarded as a substantial inclosure of a very small part of lot 84 by one occupying and cultivating the adjoining lot 4. The case then presented the facts, visible upon the ground, of inclosure and cultivation. Upon these facts the supreme court decided that title to lot 84 by comptroller's deed upon tax sale was not good, because there had been no notice to

redeem. This decision was reversed by the court of last record, and the theory of such reversal was expressed by Brownson, J., in these words: "In all of the cases where it has been held that notice was necessary, there was a substantial occupancy of some part of the lot or parcel of land, with an intention to enjoy the property, either by right or by wrong; while here the enjoyment seems to have been merely accidental, and without an intention to occupy any part of lot 84."

We cannot resist the conclusion that nothing done by Moody constituted "actual occupation" of these "meadows." Until his arrangement with the owner, he was a naked and confessed trespasser. The annual repetition of the trespass did not make it more than a trespass. He came to the owner with that confession and pretending nothing more. It is not improbable that very many "natural meadows" exist among the Adirondack forests which are, and for many years have been, annually mowed and the grass taken away precisely as this had been, but it cannot be that this constitutes actual occupation of them. If it were so, the assessment of all such lands as non-resident would seem to be void, and all the sales of them for non-payment of taxes inoperative, beyond the curative effect of any exercise of legislative power.

Joslyn *vs.* Rockwell, *supra.*

103 After the arrangement with the owner, and in October, 1879, he was exercising a privilege—enjoying a definite license to do a specific thing—which was, to cut and carry away grass from this piece of land. There was in our opinion no holding of the land, no possession of the premises as such—nothing more than the enjoyment of a license to do some one thing upon the premises. This too was enjoyed not by him as agent of the owner or for the benefit of the owner, but for his own personal advantage.

The conclusion reached seems to us fully supported by the analogy of numerous decisions of our courts in actions of a different class.

For example, the action to quiet title lies only when the plaintiff has been for three years "in the actual possession" (Code, sec. 1638), and the action of ejectment must be brought against the occupancy, if the premises are "actually occupied" (Code, sec. 1502), and may be maintained, in the absence of paper title, by proof of the plaintiff's actual possession unlawfully entered upon by defendant.

Illustrations of what constitutes "actual possession" or "actual occupation" in such cases, are given by the following adjudications:

In actions to quiet title—

Cleveland *vs.* Crawford, 7 Hun, 616.

Churchill *vs.* Onderdonk, 59 N. Y., 134.

See also the Massachusetts case of—

Jeffrey's Neck *vs.* Ipswich, 26 N. E. Rep., 239.

And the Vermont case of—

Town of Corinth *vs.* Locke, 20 Atl. Rep., 809.

In ejectment—
Shaver *vs.* McGraw, 12 Wend., 558.
Lane *vs.* Gould, 10 Barb., 254.
Redfield *vs.* Utica, etc., R. R., 25 Barb., 54.
104 Miller *vs.* Downing, 54 N. Y., 631.
Thompson *vs.* Burhans, 79 N. Y., 93.
Martin *vs.* Rector, 101 N. Y., 77.
Gouverneur *vs.* Nat'l Ice Co., 11 N. Y. Supp., 87.

So too in cases of trespass and the like—
Wheeler *vs.* Spinola, 54 N. Y., 377.
Miller *vs.* Long Island R. R., 71 N. Y., 380.
Price *vs.* Brown, 101 N. Y., 669.
Roe *vs.* Strong, 107 N. Y., 350.
Lyon *vs.* Sellew, 34 Hun, 124.
Pierce *vs.* Keator, 9 Hun, 532; affd. 70 N. Y., 419.

The tendency of all the authority in this State, so far as we have been able to discover it, would seem to be, that to constitute actual occupancy of land, there must be either residence, use of buildings for business, manufacturing, etc., inclosure, cultivation, or use of the land in connection with some known farm, or for the supply of fuel and fencing timber for ordinary use, and also an intention to possess and enjoy the land, either by right or by wrong, as distinguished from enjoyment of a license to do some act upon the land or profit *a prendre*.

We have been referred to numerous cases decided in other jurisdictions, which we have carefully considered, with many others not cited by counsel. These are not in harmony, and we need not speculate as to the weight of conflicting precedents from other States to determine on which side of the question the balance descends, having such abundance of authority of our own jurisdiction.

Having given much time and labor to this question, with the aid of able and scholarly arguments by the learned counsel on each side and the careful examination of a very large number of adjudications, we have reached the conviction that the plaintiff was not under the necessity of showing service of any notice to redeem, because there was no "actual occupancy" of any part of the premises conveyed to the State by the comptroller.

105 At a general term of the supreme court, held in and for the third judicial department of the State of New York, at the city hall, in the city of Albany, on the 8th day of May, 1894.

Present: Hon. Stephen L. Mayham, presiding justice; Hon. D. Cady Herrick, Hon. John R. Putnam, associate justices.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against
BENTON TURNER, Appellant.

The above-entitled action having been duly reached in its regular order on the calendar:

Now, on motion of Albert Hessberg, of counsel for the plaintiff,

respondent, and after hearing Thomas F. Conway, Esq., of counsel for the defendant, appellant; it is—

Ordered, that the judgment so as aforesaid appealed from be and the same hereby is in all things affirmed, with costs to plaintiff, respondent.

Filed & entered in Franklin county May 18, 1894.

JAS. D. WALSH, *Clerk.*

106 Supreme Court, Franklin County.

THE PEOPLE OF THE STATE OF NEW YORK *against* BENTON TURNER. } Judgment. May 18, 1894.

The appeal from the judgment in the above-entitled action having been duly reached in its regular order on the calendar, at a general term of the supreme court, held in and for the third judicial department, at the city hall, in the city of Albany, on the 8th day of May, 1894, and said judgment having been affirmed by the order of said court, duly entered:

Now, on motion of Albert Hessberg, of counsel for the plaintiff it is—

Adjudged, that the judgment so as aforesaid appealed from be and the same hereby is in all things affirmed.

It is further adjudged, that The People of the State of New York, the plaintiff, respondent, recover of Benton Turner, the defendant, appellant, the sum of seventy-two dollars and four cents ($72.04) as costs and disbursements on said appeal.

Filed & entered in Franklin county May 18, 1894.

F. S. CHANNELL, *Clerk.*

107 New York Supreme Court, Franklin Court.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *against* BENTON TURNER, Appellant. }

SIRS: You will please take notice that the defendant, Benton Turner, hereby appeals to the court of appeals from the judgment of the general term of the supreme court in the above-entitled action, entered in the office of the clerk of Franklin county on May 18, 1894, affirming with $72.04 costs the judgment rendered in this action in favor of plaintiff and against defendant for two thousand one hundred and ninety-eight dollars and sixty cents ($2,198.60), and entered in Franklin county clerk's office, June 6, 1891.

Dated May 24, 1894.

Yours, &c., FRANK E. SMITH,
Attorney for Appellant, Plattsburgh, N. Y.

To Hon. Albert Hessberg, attorney for respondent, Albany, N. Y.; F. S. Channel, Esq., Franklin county clerk.

Indorsed: Filed June 1, 1894.

108 STATE OF NEW YORK, }
County of Franklin. }

I, Frank S. Channel, clerk of Franklin county, do hereby certify that I have compared the foregoing notice of appeal to the court of appeals and judgment-roll on the affirmance by the general term of the judgment in the action of The People of the State of New York against Benton Turner with the original thereof now on file and of record in my office, and that the same are true copies of said originals respectively and of the whole thereof.

In witness whereof, I have hereunto set my hand and official seal this 11 day of June, 1894.

[L. S.]

F. S. CHANNEL,
Clerk of Franklin County.

109 N. Y. Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, }
vs.
BENTON TURNER, Appellant. }

CITY AND COUNTY OF NEW YORK, *ss:*

Frank E. Smith, being duly sworn, says: I am the attorney and of counsel for appellant. No opinion was written by any justice of the general term of the supreme court on rendering the judgment appealed from in the above-entitled action.

FRANK E. SMITH.

Sworn before me this 4th day of June, 1894.

FRANK WALLING,
Notary Public, N. Y. Co.

110 Duplicate.

STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 9th day of April, in the year of our Lord one thousand eight hundred and ninety-five, before the judges of said court.

Witness the Hon. Charles Andrews, chief judge, presiding.

GORHAM PARKS, *Clerk.*

Remittitur April 9th, 1895.

111 THE PEOPLE OF THE STATE OF NEW YORK, Resp'd't, }
ag'st
BENTON TURNER, App'l'nt. }

Be it remembered that on the 20th day of June, in the year of our Lord one thousand eight hundred and ninety-four, Benton Turner, the appellant in this action, came here into the court of appeals, by Frank E. Smith, his attorney, and filed in the said court a

notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and The People of the State of New York, the respondent in said action, afterwards appeared in said court of appeals, by Albert Hessberg, their attorney; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

112 Whereupon the said court of appeals, having heard this cause argued by Mr. Frank E. Smith, of counsel for the appellant, and by Mr. Albert Hessberg, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the said supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

113 Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *April 9th*, 1895.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[Seal Court of Appeals, State of New York.]

GORHAM PARKS, *Clerk.*

114 THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.
BENTON TURNER, Appellant.

(Decided April 9, 1895.)

Frank E. Smith for appellant.
Albert Hessberg for respondent.

GRAY, *J.:*

The appellant in this case is the same person, whose appeal was recently under review by us. (117 N. Y. 227.) The decision there made must be regarded as operative in the present ap-

peal. In the former case the action was to recover penalties for cutting trees upon certain lands in Franklin county, in this State: while in this case the action is one of replevin to recover logs taken by the defendant from other lands in that county. The facts, affecting the defendant's position towards the lands, differ in the two cases, in this: that in the earlier case the defendant was not in possession and showed no title to the lands and was, therefore, a trespasser; while in the present case he claims to have acquired the title and to have been in possession. Although we might safely rest the determination of this appeal upon the decision rendered in the previous case, where the question was treated as though the defendant had a right, as an owner of the property, to rebut the plaintiff's proof of title, I will, nevertheless, state briefly, the reasons for affirming this judgment.

The facts respecting the acquisition of title by the defendant are these, viz: That the defendant received in 1886 a deed from one Riley, who, in the same year, had acquired an interest in the lands by a conveyance from six of the eight children of one Norton. Norton had acquired the lands in 1872 from the Barnards, who appear to have held the same by tax title. Norton died in 1882 and subsequently to his death the conveyance to Riley was made by six of his children, which I mentioned. The plaintiff's title to the lands was acquired through a conveyance by the comptroller to the State October 12th, 1877. He had purchased the same at tax sales made for the unpaid taxes of the years 1866 to 1870, inclusive. His deed was made June 9th, 1881, and was recorded June 8th, 1882. The two years allowed for redemption had expired October 12th, 1879. Three years after the record of the people's deed, chapter 448 of the Laws of 1885 was enacted. That act provided that, "All conveyances that have been heretofore executed by the comptroller * * * after having been recorded for two years in the office of the clerk of the county, in which the lands conveyed thereby are located, * * * shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto * * * were regular." The section further provided that, "All such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town
115 or ward having no legal right to assess the land on which they are laid." The lands in question are within what is known as the "forest preserve of the State of New York;" and the second section of the act of 1885 makes its provisions applicable to those counties which include the forest preserve. The six months mentioned in the act, within which tax sales and proceedings might be open to question after the act went into effect, expired December 9th, 1885. The forest commission had been established in May, 1885, and, by the act creating that commission, it was given the care, custody, control and superintendence of the forest preserve. A warden was employed by the forest commission, who discovered

the cutting of the timber by the defendant, and this action was then brought, in behalf of the people, by the forest commission.

Referring now to the points taken by the appellant, in objection to the right of the people to maintain their action against him, he claims that the tax sale of 1877 was illegal and void; for the reasons that the tax for the year 1867 was based on an assessment-roll verified before the third Tuesday of August and, as to the tax for the year 1870, that the tax-assessors had omitted to meet on the third Tuesday of August, as required by law. He further claims that these were jurisdictional defects, which the act of 1885 could not cure, and he also asserts the unconstitutionality of the act. As to the first objection, relating to the proceedings of the tax-assessors, I would observe, in the first place, that they were not jurisdictional defects, in any proper sense. They were irregularities in the proceedings for the assessment of the tax. Some confusion of thought may be occasioned by the ungarded language of Chief Judge Ruger in People *v.* Turner (117 N. Y. 227), who speaks of the irregular proceedings by the assessors as jurisdictional defects. But it is very clear that he did not intend the full force of that expression and that he used those words in the sense in which they were used by Judge Finch in Ensign *v.* Barse (107 N. Y. 329). In the latter case it was held that those defects only which went to the jurisdiction and authority of the assessors were not cured by the act of 1882. The defect there considered was the defective date of the assessors' certificate and that was deemed to be in the nature of an irregularity, merely. In Joslin *v.* Rockwell (128 N. Y. 338), it was held that the act of 1885, now in question, did not differ, in any material respect, from the act of 1882, which was discussed in Ensign *v.* Barse. The defects which the appellant here points out in the proceedings of the tax-assessors are not unlike, in their effect, to those which were relied upon in his former case. There they consisted of the alleged omission by the assessors to give notice of a review of the assessments in the years referred to, or to hold a meeting for such purpose, as required by the statute, and in closing and verifying the assessments prior to the time provided by law. Those irregularities of the assessors were considered by Judge Ruger in connection with the effect to be given to the comptroller's deed, after a certain lapse of time, under the act of 1885. It was held that
116 the act, in its principal aspect, was one of limitation and that, as such, it was within the constitutional power of the legislature to enact as affecting future cases and, as well, existing rights. The appellant concedes that under that decision the act of 1885 must be regarded as a statute of limitation; but he, nevertheless, insists upon a distinction in the facts between the two cases. He claims here to stand in the shoes of Norton, who was the owner of the lands at the time of the tax sale and of the passage of the act of 1885. As I apprehend his proposition, it is about this, viz: that while the act is operative in cases where the purchaser at a tax sale is in actual possession, it is invalid as against the owner of the lands who, at the time of the sale and of the passage of the act was, and remained, in possession, actual or constructive. By a process of in-

genious reasoning upon the theory of statutes of limitations, the appellant undertakes to show that the theory is inapplicable to the case of the owner in possession, to whom there does not merely, by reason of the tax sale, accrue any cause of action either to obtain title or possession, or to cancel the sale as a cloud upon title. The argument is that the sale was void and that the owner could rest upon its invalidity and defend himself whenever attacked. All that the appellant says, however, is practically an argument upon our previous decision and to obviate its effect. In the other case, while it was doubted whether a stranger, not in possession or claiming title and, therefore, not aggrieved, could raise the question of the invalidity of the act of 1885, in its operative effect upon the property of another, the opinion proceeded upon the assumption that the defendant had the right to rebut the plaintiff's proof of title and took up the question whether the owner of the property had been deprived of it without due process of law and an opportunity of being heard. That question enters the case in this way, namely, that the opportunity for the appellant to be heard before the assessors, at a meeting to be held, as provided by law, on the third Tuesday of August, was taken away from him by the fault of the assessors. In the other case, it was said, that the argument that a lawful exercise of the taxing power by the legislature requires that an opportunity to be heard before the taxing officers, in respect to the imposition of a tax, should be afforded to the tax-payer, or otherwise he is deprived of his day in court, fails if it can be shown that he was not actually, or substantially, deprived of that opportunity. Upon an examination of the statute under which the tax was levied, we thought that the tax-payer was not deprived of such notice and opportunity to be heard as the nature of the case required. We thought that while the act gave the tax-payer the right to appear before the assessors at the time stated, in order to persuade them to modify, or vacate, his assessment, that he still had, under the law, the right, in case of a neglect of the assessors to meet, of appeal to the board of supervisors at their next annual meeting; they having power to review and correct the assessment. "Ample opportunity is thereby given the tax-payer, if he feels aggrieved in
117 respect to assessments of his property, to be heard before the board of supervisors, who are vested with full power to afford all and any relief which was possessed by the assessors." The opinion was there expressed that, "the opportunity afforded the tax-payer to appear before the board of supervisors and challenge the legality and fairness of his assessment, was a satisfaction of his rights in respect to a hearing on the subject. It would have been competent for the legislature, while authorizing the imposition of taxes, to have omitted altogether the provisions requiring notice and a meeting by the assessors to review assessments, and to have provided only for a hearing before the supervisors in the first instance. * * * So long as the tax-payer is given the equivalent, therefore, the legislature has done all that is required of it under any view of the tax-payer's constitutional rights." The opinion then proceeds as follows: "But more than this. After the

tax has been returned to the comptroller, the tax-payer has still the right, both before and after the sale of his property, to appear before that officer and make proof of any illegality in the tax levy, and demand that such tax, and any sale made thereon, shall be canceled by him. (Citing the statutes.) And finally the act of 1885 itself provides for the exercise of the right of the comptroller to cancel taxes and sales illegally made, where the taxes have been legally paid, or where the town or ward had no legal right to assess the land. These rights were not only open to the tax-payer to exercise at any time previous to the act of 1885, but the right of all persons to exercise them was also preserved in all cases for six months after the passage of that act. * * * It would seem that the right of a property-owner to assert his title to property claimed by him, after such ample opportunities to protect such right had been afforded, could be regulated by a law of limitation without incurring the objection that his property had been taken without due process of law." The authoritative expressions in the opinion referred to, are applicable to the present case. Conceding the irregularity in the assessment proceedings to have been such as rendered the sale invalid, nevertheless, the assessors had the jurisdiction and authority to assess and if they erred in their proceedings, and neglected to take the steps which the statute required, there was, in the first place, the remedy of an appeal to the board of supervisors; and, in the second place, there was the opportunity to appear before the comptroller. By virtue of the act of 1885, that opportunity to appear before the comptroller and to demand the cancellation of the tax sale, because of irregularities of the proceedings leading to the sale, was continued for six months after the passage of the act. Differing from a case between the owner of lands and the purchaser thereof at the tax sale, where the comptroller would not have the power upon the application of the owner to cancel a tax title, here the State became the owner through the purchase and it was open to the owner to come before the comptroller and make proof of the invalidity of the sale through which the State derived its title. With the knowledge of the law,
118 the person claiming to be the owner of the land sold was chargeable; and when put upon his inquiry, as to the result of the proceedings, he discovered the State to have become the purchaser, it was incumbent upon him to take affirmative steps to cancel the sale, if he would recover his title to the lands. There may be considerable doubt with respect to the nature of the possession by Norton and of this appellant; but, however that may be, the State was constructively in possession through the comptroller's purchase and deed. The effect was that the State had resumed its ownership of the land and its title thereto was assured as the result of the proceedings, until invalidated by proof respecting the illegality of the proceedings leading to the tax sale. That title, by force of the provisions of the act of 1885, became unquestionable upon the expiration of the six months after it went into effect. While we think the people were not bound to take any steps towards actual possession, after the conveyance to them of the land, any

doubt upon the subject would seem to be eliminated by virtue of the provisions of the act which created the forest commission and placed the forest preserve, within which are the lands in question, in the care, control and supervision of the commission. The constructive possession which the State had acquired, I think, was made an actual possession by the powers and duties devolved upon the forest commission as its representative.

The appellant raises a final point, that there was an actual occupancy of part of the lands proven and, as no notice was served on the occupant, no title was acquired under the sale of 1877. It would seem that that objection was one of those which should be taken upon an application to the comptroller by the owner, within the time allowed by the act of 1885 to complain of the invalidity of the sale. But the objection in any view is quite untenable. The finding of the referee was that the land was wild, uncultivated and unimproved forest land; with a small natural meadow of about ten acres, upon which, some time after the year 1870, by the leave of Norton, the then owner, one Moody entered and cut and hauled away grass. Upon two occasions he had scattered a little grass seed and at times he had dammed up the brook, so as to overflow about half an acre. There was no residence, nor building upon the land, nor any cultivation or inclosure thereof, as was the case in People *ex rel.* Chase *v.* Wemple (144 N. Y., 478). We think the proof fell far short of establishing any such actual occupancy of the lands by any person, as called for a compliance with the provision of the law that a written notice to redeem must be served on the occupant.

I do not think it necessary to consider, at further length, the questions argued by the appellant. Enough has been said, in connection with our previous decision in this appellant's other case, to show that the judgment recovered by the people in this case was correct and should be affirmed, with costs.

All concur.

Judgment affirmed.

A copy.

H. E. SICKELS, *Reporter C.*

[Endorsed:] People *v.* Turner. Opinion. Gray, J.

119 UNITED STATES OF AMERICA, *ss:*

To The People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein Benton Turner is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the

Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

120 [Endorsed:] Due personal service of the within citation is hereby admitted. Dated April 23d, 1895. Albert Hessberg, attorney for The People of the State of New York, defendant in error. 1016, 15,900. May 15, '95.

121 [Endorsed:] Case No. 15,900. Supreme Court U. S., October term, 1894. Term No., 1016. Benton Turner, P. E., *vs.* The People of the State of New York. Citation & proof of service. Filed May 17, 1895.

Endorsed on cover: Case No. 15,900. New York court of appeals. Term No., 273. Benton Turner, plaintiff in error, *vs.* The People of the State of New York. Filed May 11th, 1895.